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In the Supreme Court of the United States

October Term, 1967
No. 675

TOWNSHIP OF SPRINGFIELD, DELAWARE COUNTY, PENNSYLVANIA,
Appellant

vs.

IDA MAY GREEN, Owner and SAMUEL R. GREEN, LESLIE D. GREEN and RUSSELL F. GREEN, Tenants,
Appellees

On Appeal from the Supreme Court of Pennsylvania as of Nov. 213, Miscellaneous Docket No. 15.

JURISDICTIONAL STATEMENT

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INDEX

	Page.
Brief for Appellant:	
Jurisdictional Statement	1
I. Opinions Below	2
II. Jurisdiction	4
III. Statutes Involved	7
IV. Questions Presented	15
V. Statement of the Case	16
VI. The Questions Are Substantial:	
(a) Rule 68½ of the Supreme Court of Pennsylvania is an abuse of due process in that it attempted to abolish a right of appeal in the nature of a broad certiorari which had theretofore existed as a part of its common law of the Commonwealth of Pennsylvania	18
(b) The appellant is not estopped from raising the question of the unconstitutionality of Rule 68½	22
(c) Even if Rule 68½ is not unconstitutional the denial of appellant's petition was in itself an abuse of due process	23
(d) Ordinance No. 786 of Springfield Township, amending the section of its Zoning Ordinance relating to the E Business District, is not repugnant to the Constitution of Pennsylvania or the Constitution of the United States	24
VII. Conclusion	40
Appendix "A"—Opinion of the Court of Common Pleas of Delaware County, Pennsylvania, filed February 4, 1967	42

Appendix "B"—Additional Opinion of the Court of Common Pleas of Delaware County, Pennsylvania, filed February 23, 1967 55

Appendix "C"—Rule 68½ of the Supreme Court of Pennsylvania 57

Appendix "D"—Petition of the Township of Springfield, filed on March 27, 1967 59

Appendix "E"—Order of the Supreme Court of Pennsylvania, filed June 1, 1967 78

Appendix "F"—Petition for Reconsideration, filed by the Township of Springfield on June 12, 1967 .. 79

Appendix "G"—Order of the Supreme Court of Pennsylvania, filed July 6, 1967 87

TABLE OF CITATIONS

CASES:

Aberman v. New Kensington, 377 Pa. 520 (1954) ... 33, 35, 36, 37

A. N. "Ab" Young Company Zoning Case, 360 Pa. 429 (1948) 31, 32, 33, 34, 35, 36, 37

Archbishop O'Hara's Appeal, 389 Pa. 35 38

Bell's Appeal, 396 Pa. 592, 152 A. 2d 731 (1959) 19

Bilbar Construction Co. v. Easttown Township Board of Adjustment, 393 Pa. 62, 141 A. 2d 851 (1958) 39

Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94, 61 A. 2d 426 (1948) 18, 19

Commonwealth v. Kilgallen, 379 Pa. 315, 325, 108 A. 2d 780 (1955) 22

Equipment Corp. of America v. Primos Vanadium Co., 285 Pa. 432, 132 A. 360 6

Harrisburg v. Pass, 372 Pa. 318 (1953) 33, 37

Hertrick Appeal, 391 Pa. 148 (1958) 35, 37

Lhormer v. Bowen, 410 Pa. 508 (1963) 35, 37
Penn Township v. Yecko Bros., 420 Pa. 386 (1966) .. 37
Peterson v. Atlantic City R. Co., 177 Pa. 335, 35 A. 621, 34 L.R.A. 593 6
Schechter v. Zoning Board of Adjustment, 395 Pa. 310 (1959) 35, 37
Shender v. Zoning Board of Adjustment, 388 Pa. 265 (1957) 34, 35, 37
Verratti v. Ridley Township, 416 Pa. 242 (1965) ... 36, 37
Volpe Appeal, 384 Pa. 374, 121 A. 2d 97 (1956) ... 39

MISCELLANEOUS:

Standard Pennsylvania Practice, Volume 1, revised, p. 352 5
1 West Federal Forms 189, footnote 10 5

CONSTITUTIONS:

Constitution of the United States, Fourteenth Amendment, Section 1 ..... 7, 40
Constitution of the Commonwealth of Pennsylvania, Article V, Section 3 7

RULE:

Rule 68½ of the Supreme Court of Pennsylvania ... 1, 9, 15, 16, 17, 18, 22, 23

STATUTES:

Act of May 22, 1722, 1 Sm. L. 131, 140, Section XIII, 17 P.S. Section 41 7
Act of June 16, 1836, P. L. 784, Sec. 1, 17 P.S. Sec. 41 8
Act of June 24, 1931, P. L. 1206 (First Class Twp. Code):
Art. XXXI, Sec. 3101 et seq. (53 P.S. 58101 et seq.) 11
Art. XXXII, Sec. 3201 et seq. (53 P.S. 58201 et seq.) 12
Art. XV, Sec. 1502 (53 P.S. 56502) 14, 31
Title 28, U.S.C. Section 1257(2) 5

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No.

Township of Springfield, Delaware County, Pennsylvania

vs.

Ida May Green, Owner and Samuel R. Green, Leslie D. Green and Russell F. Green, Tenants

On Appeal from the Supreme Court of Pennsylvania.

JURISDICTIONAL STATEMENT

The Appellant, the Township of Springfield, Delaware County, Pennsylvania, appeals from the final judgment of the Supreme Court of Pennsylvania, denying a Petition for Reconsideration of the Denial of a Petition for Special Certiorari under Rule 68½ of the Supreme Court of Pennsylvania, which petition had been filed to obtain a review of the final decree of the Court of Common Pleas of Delaware County, Pennsylvania, holding that an amendment to the Zoning Ordinance of Springfield Township, Delaware County, Pennsylvania, was unconstitutional in general and particularly, as it applies to the property of the appellees, Ida May Green, Owner and Samuel R. Green, Leslie D. Green and Russell F. Green, Tenants. This Statement is submitted to show the jurisdiction of this Court and that substantial federal questions are involved.

I. OPINIONS BELOW

This case arose in the Court of Common Pleas of Delaware County, Pennsylvania:

The Opinion of the Court of Common Pleas of Delaware County, Pennsylvania, was filed on February 4, 1967 (Appendix A, infra, pp. 42-54) and is unreported.

An additional Opinion of the Court of Common Pleas of Delaware County, Pennsylvania, was filed on February 23, 1967 (Appendix B, infra, pp. 55-56) and is unreported.

Rule 68½ of the Supreme Court of Pennsylvania (Appendix C, infra, pp. 57-58) provides, inter alia, that "When the subject matter does not fall within the statutory jurisdiction of the Superior Court, an appeal to the Supreme Court, in the nature of a certiorari from a judgment, order or decree will only lie if specifically allowed by the Court or a Judge thereof. . . ."

On March 27, 1967, the Township of Springfield, the petitioner herein, filed a petition in the Supreme Court of Pennsylvania, under Rule 68½, supra, requesting the Supreme Court of Pennsylvania to grant a certiorari to the Court of Common Pleas of Delaware County, Pennsylvania (Appendix D, infra, pp. 59-77).

The order of the Supreme Court of Pennsylvania denying the petition was filed June 1, 1967 (Appendix E, infra, p. 78) and is unreported.

Opinions Below

On June 12, 1967, the Township of Springfield, the petitioner herein, filed a petition in the Supreme Court of Pennsylvania requesting a reconsideration of its action on the ground, inter alia, that its constitutional rights under the Constitution of the United States had been violated (Appendix F, infra, pp. 79-86).

The order of the Supreme Court of Pennsylvania denying reconsideration was filed July 6, 1967 (Appendix G, infra, p. 87) and is unreported.

II. JURISDICTION

This case arose in the Court of Common Pleas of Delaware County, Pennsylvania when the appellees, Ida May Green et al., appealed to that court from the refusal of the Board of Adjustment of the Township of Springfield to issue a use registration and zoning permit for a restaurant because the desired use did not comply with a recent amendment to the Zoning Ordinance of the Township. The appellees contended in the lower court that the amendment to the Zoning Ordinance was unconstitutional and the Court of Common Pleas upheld their contention (Appendices A and B, infra, pp. 42-56). The appellant, the Township of Springfield, desiring to uphold the constitutionality of the amendment to its Zoning Ordinance, filed a petition in the Supreme Court of Pennsylvania requesting it to grant a certiorari to the Court of Common Pleas of Delaware County to review the order of that court (Appendix D, infra, pp. 59-77) The Supreme Court of Pennsylvania denied the appellant's petition (Appendix E, infra, p. 78). Thereupon, the appellant filed a petition for reconsideration and set forth therein, inter alia, its contention that Rule 68½ of the Supreme Court of Pennsylvania was a violation of due process and was unconstitutional (Appendix F, infra, pp. 79-86). The appellant's Petition for Reconsideration was denied (Appendix G, infra, p. 87). Notice of Appeal was filed with the Prothonotary (Clerk) of the Supreme Court of Pennsylvania on August 4, 1967.

Jurisdiction

The jurisdiction of the Supreme Court to review the Order by direct appeal is conferred by Title 28, U.S.C. Section 1257(2) which reads:

> "(2) By appeal, where is drawn in question the validity of the statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity."

The phrase "statute of any state" in this provision has been consistently interpreted to embrace every legislative action to which a state gives the force of law. 1 *West Federal Forms* 189, footnote 10 and cases cited. The Rules of the Supreme Court of Pennsylvania have the force of statute.

In *Standard Pennsylvania Practice,* Volume 1, Revised, page 352, it is said:

> "By the Act of 1836 (Act of June 16, 1936, P. L. 784, Sec. 21, 17 P.S. 2076) as amended, the courts of the Commonwealth, including the Supreme Court, but excluding the Orphans' Courts, have authority to establish such rules for regulating practice and expediting the termination of proceedings, not inconsistent with the Constitution and laws of the state, as they shall judge proper.
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> • • • • • • • •
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> "The rules of the Supreme Court are of two classes. One class provides for the practice and procedure in that Court, including appeals from, and certioraris to, the lower courts. The other class is of more general nature and governs, within the scope

of such rules, practice and procedure in the lower courts of Pennsylvania. Not only has the Supreme Court the inherent power to make rules regulating the business of the court, but also, *such rules have statutory power.*''

Cases cited in support of the foregoing principles are *Peterson v. Atlantic City R. Co.*, 177 Pa. 335, 35 A. 621, 34 L.R.A. 593, and *Equipment Corp. of America v. Primos Vanadium Co.*, 285 Pa. 432, 132 A. 360, and cases therein cited.

III. STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, inter alia:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law."

Article V, Section 3 of the Constitution of the Commonwealth of Pennsylvania, provides:

> "The jurisdiction of the Supreme Court shall extend over the State, and the judges thereof shall, by virtue of their offices, be justices of oyer and terminer and general jail delivery in the several counties; they shall have original jurisdiction in cases of injunction where a corporation is a party defendant, of habeas corpus, of mandamus to courts of inferior jurisdiction, and of quo warranto as to all officers of the Commonwealth whose jurisdiction extends over the State, but shall not exercise any other original jurisdiction; they shall have appellate jurisdiction by appeal, certiorari or writ of error in all cases, as is now or may hereafter be provided by law."

The Pennsylvania Act of May 22, 1722, 1 Sm. L. 131, 140, Section XIII, 17 P.S. section 41, note, provided:

> "'The said judges, or any two of them, shall have full power to hold the said court, and therein to hear

and determine all causes, matters and things, cognizable in the said courts; and also to hear and determine all and all manner of pleas, plaints and causes, which shall be removed or brought there from the respective general quarter sessions of the peace and courts of common pleas, or from any other court of this province, by virtue of any of the said writs; and to examine and correct all and all manner of errors of the justices and magistrates of this province, in their judgments, process and proceedings in the said courts, as well in all pleas of the crown, as in all pleas real, personal and mixed; and thereupon to reverse or affirm the said judgments, as the law doth or shall direct; and also to examine, correct and punish the contempts, omissions and neglects, favors, corruptions and defaults of all or any of the justices of the peace, sheriffs, coroners, clerks and other officers, within the said respective counties; and also shall award process for levying as well of such fines, forfeitures and amercements, as shall be estreated into the said supreme court, as of the fines, forfeitures and amercements which shall be lost, taxed and set there, and not paid to the uses they are or shall be appropriated; and generally shall minister justice to all persons, and exercise the jurisdictions and powers hereby granted, concerning all and singular the premises, according to law, as fully and amply, to all intents and purposes whatsoever as the justices of the court of king's bench, common pleas and exchequer, at Westminster, or any of them, can or may do.'"

The Pennsylvania Act of June 16, 1836, P. L. 784, Sec. 1, 17 P.S. Sec. 41, provides:

"The supreme court of this commonwealth shall have power to hear and determine all, and all manner of pleas, plaints, and causes which shall be brought, or removed there from any other court of this commonwealth, by virtue of any writ or process issued by the said court, or any judge thereof, for that purpose, in the manner now practised and allowed, to examine and correct all and all manner of errors of the justices, magistrates, and courts of this commonwealth, in the process, proceedings, judgments and decrees, as well in criminal as in civil pleas or proceedings, and thereupon, to reverse, modify, or affirm such judgments and decrees, or proceedings, as the law doth or shall direct; and generally, to minister justice to all persons, in all matters whatsoever, as fully and amply, to all intents and purposes, as the said court has heretofore had power to do, under the Constitution and laws of this commonwealth; and shall have power, and is required to issue execution, or other process, for the recovery of costs which have accrued, or may accrue in said supreme court, as well as in all cases which have been heretofore decided."

Rule 68½ of the Supreme Court of Pennsylvania, which has the force of statute, provides:

"Where the subject matter does not fall within the statutory jurisdiction of the Superior Court, an appeal to the Supreme Court in the nature of a certiorari from a judgment order or decree will lie only if specially allowed by the Court or by a Judge thereof, where a statute expressly provides that there shall be no appeal from the decision or order or judgment or decree of a Court, or that the decision or order or

judgment or decree of a Court shall be final or conclusive, or shall not be subject to review, or where the relevant statute is silent on the question of appellate review.

"In all such cases, the appellant shall file within 30 days from the date of the decision or order or judgment or decree sought to be reviewed a petition, together with seven (7) copies thereof, in the office of the Prothonotary, setting forth the questions involved, a full statement of the facts, appellant's contentions and a citation of authorities which support them, and also a copy of every opinion, order, judgment and decree of the lower Court and the board or commission or agency which has been filed in the case. The appellant shall annex to his petition an affidavit that the application for certiorari is not being made for the purpose of delay. Appellant shall forthwith serve upon appellee, or his counsel, a copy of the petition. The fee or fees payable to the Prothonotary for filing any such petition shall be the same as the fee or fees which would be charged by the Prothonotary in the case of an ordinary appeal. Within ten (10) days after service of the petition, the appellee shall file in the office of the Prothonotary an answer, together with seven (7) copies thereof, setting forth, if desired, a counter-statement of the questions involved and a counter-statement of the facts, if desired, and his contentions and a citation of authorities which support them. Appellee shall forthwith serve upon the appellant or his counsel a copy of his answer."

Statutes Involved

The Pennsylvania Act of June 24, 1931, P. L. 1206 (The First Class Township Code), Art. XXXI, Sec. 3101 et seq. (53 P.S. 58101 et seq.), as amended, provides:

"For the purpose of promoting health, safety, morals, or the general welfare of townships, the boards of township commissioners are hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, their construction, alteration, extension, repair, maintenance and all facilities and services in or about such buildings and structures, and percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population and the location and use of buildings, structures, and land for trade, industry, residence, or other purpose; and may also establish and maintain building lines and set back building lines upon any or all public streets and highways.

(a) For any or all said purposes, the board of township commissioners may divide the township into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this article. Within such districts, it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land. All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in another district.

Such regulations shall be made in accordance with a comprehensive plan, and designed to lessen congestion in the streets, to secure safety from fire, panic

and other dangers, to promote health and the general welfare, to provide adequate light and air and to prevent the overcrowding of land, to avoid undue concentration of population, to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such township."

The Pennsylvania Act of June 24, 1931, P. L. 1206 (The First Class Township Code), Art. XXXII, Sec. 3201 et seq. (53 P.S. 58201 et seq.), as amended, provides:

"The township commissioners may create by ordinance and appoint a planning commission, consisting of five persons. In the first instance, one member of said commission shall be appointed for one year, one for two years, one for three years, one for four years, and one for five years, and annually thereafter a member of said commission shall be appointed for a term of five years. An appointment to fill a vacancy shall be for the unexpired portion of the term. All members of the commission shall reside within the township. They shall serve without compensation, and make annually to the township commissioners a report of their transactions. The planning commission may, with the consent of the township commissioners, retain the services of an engineer or engineers, as well as other necessary employees, and may contract for professional planning services, the costs and expenses

of which, when approved by the township commissioners, shall be provided for through proper appropriations. The township commissioners shall appropriate such sum as they deem necessary for defraying the expenses of the planning commission, including the salaries of, the engineer or other employes, and, in no event, shall the expenses of the planning commission, exceed the amount of the appropriation.

In addition to filing an annual report, it shall be the duty of the planning commission to make, or cause to be made, and to lay before the township commissioners, maps and plans of the township, or any portion thereof, showing the streets, highways and other natural and artificial features, and also any locations recommended by it for any new public buildings, civic schemes, parkways, parks, playgrounds or any other public grounds or public improvements, and any widening, extension, or relocation of the same, and thereafter, from time to time, the planning commission may lay before the township commissioners any modification, change or supplement to any prior plan or plans. The planning commission may also, from time to time, make recommendations to the township commissioners with respect to any and all matters and things referred to in this section, and, in so doing, shall have regard for the present conditions and future needs and growth of the township.

Any maps or plans so submitted shall not be effective unless regularly approved and adopted by ordinance or resolution of the township commissioners, and after such approval and adoption shall be sub-

ject to revision and change from time to time as the township commissioners may deem expedient."

The Pennsylvania Act of June 24, 1931, P. L. 1206 (The First Class Township Code), Art. XV, Sec. 1502 (53 P.S. 56502), as amended, provides, inter alia:

> "Complaint as to the legality of any ordinance or resolution may be made to the court of quarter sessions upon entering into bond with sufficient security to be approved by the court to prosecute the same with effect and for the payment of costs by any person aggrieved, within thirty days after any ordinance or resolution takes effect. The determination and the order of the court thereon shall be conclusive. In cases of the laying out of streets over private property the court shall have jurisdiction to review the propriety as well as the legality of the ordinance."

IV. QUESTIONS PRESENTED

(a) Rule 68½ of the Supreme Court of Pennsylvania is an abuse of due process in that it attempted to abolish a right of appeal in the nature of a broad certiorari which had theretofore existed as a part of the common law of the Commonwealth of Pennsylvania.

(b) The appellant is not estopped from raising the question of the unconstitutionality of Rule 68½.

(c) Even if Rule 68½ was not unconstitutional, the denial of appellant's petition was in itself an abuse of due process.

(d) Ordinance No. 786 of Springfield Township, amending the section of its Zoning Ordinance relating to the E Business District is not repugnant to the Constitution of Pennsylvania or the Constitution of the United States.

V. STATEMENT OF THE CASE

The Township of Springfield is a Pennsylvania Township of the First Class. On January 18, 1966 it enacted Ordinance 786 which revised the regulations relating to its E Business District, which Ordinance became effective on February 6, 1966. On March 4, 1966, the Zoning Board of Adjustment denied the appellees' application for a use registration and zoning permit for a restaurant, because the application did not comply with the amended ordinance.

On April 1, 1966 the appellees appealed to the Court of Common Pleas of Delaware County and contended that the amended ordinance was unconstitutional as an abuse of due process.

In an opinion dated February 4, 1967, supplemented by another opinion dated February 23, 1967, the Court of Common Pleas sustained the appellees' contention and held that the amended Ordinance was unconstitutional in general and particularly with respect to the property owned by the appellees.

Prior to April 1, 1964, the appellant would have had the right to have appealed the decision of the Court of Common Pleas to the Supreme Court of Pennsylvania in the nature of a broad certiorari. However, on February 5, 1964, effective April 1, 1964, the Supreme Court adopted Rule 68½ which abolished the said right of appeal and substituted therefor a requirement of a petition for the special allowance of such an appeal.

The appellant, believing that its ordinance was constitutional and desiring to present that issue to the Appellate Court, on March 27, 1967, filed a petition under Rule 68½ for the allowance of a certiorari to the lower court. This petition was denied by the Supreme Court on June 1, 1967.

The appellant filed a timely Petition for Reconsideration on June 12, 1967 in which petition it alleged, inter alia, that Rule 68½ was itself unconstitutional and repugnant to the Fourteenth Amendment to the Constitution of the United States. This petition was also denied by the Supreme Court on July 6, 1967.

On August 4, 1967, the appellant filed a notice of an appeal to your Honorable Court with the Prothonotary (Clerk) of the Supreme Court of Pennsylvania.

The constitutionality of Ordinance 786 was first raised by the appellees in their appeal to the Court of Common Pleas of Delaware County.

The constitutionality of Rule 68½ of the Supreme Court of Pennsylvania was first raised by the appellant in its Petition for Reconsideration, which was the earliest time it could have done so, because prior to that time it had not been harmed thereby. The Supreme Court denied the Petition for Reconsideration but did not render any opinion upon the constitutional question raised therein.

VI. THE QUESTIONS ARE SUBSTANTIAL

(a) *Rule 68½ of the Supreme Court of Pennsylvania is an abuse of due process in that it attempted to abolish a right of appeal in the nature of a broad certiorari which had theretofore existed as a part of the common law of the Commonwealth of Pennsylvania.*

This question has not been passed upon by the Court nor by any other Court. It is respectfully submitted that it is substantial and deserves plenary consideration by your Honorable Court, with briefs and oral argument. Rule 68½ has already affected hundreds of cases in the Commonwealth of Pennsylvania and it will not be long before it has affected thousands of cases.

It is respectfully submitted that it is a clear abuse of due process and that your Honorable Court should so hold and should direct the Supreme Court of Pennsylvania to rescind that Rule.

The Supreme Court of Pennsylvania in a long line of cases, has held that it possesses all of the jurisdiction and powers of the King's Bench.

In *Carpentertown Coal & Coke Co. v. Laird,* 360 Pa. 94, 61 A. 2d 426 (1948), it said:

> "It is suggested by the Turnpike Commission that although this Court has assumed the power to issue writs of prohibition the question as to its constitutional right so to do has not heretofore been challenged or discussed. Be that as it may, the justifi-

cation for the Court's exercise of such power is to be found in the Act of May 22, 1722, 1 Sm. L. 131, 140, section XIII, which vested in the Supreme Court all the jurisdictions and powers of the three superior courts at Westminster, namely, the King's Bench, the Common Pleas and the Exchequer. Inherent in the Court of King's Bench was the power of general superintendency over inferior tribunals, a power which was of ancient inception and recognized by the common law from its very beginnings. Blackstone says, Book III, *42: 'The jurisdiction of this court (of King's Bench) is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below.' By the Act of 1722 the Supreme Court of Pennsylvania was placed in the same relation to all inferior jurisdictions that the King's Bench in England occupied, and thus the power of superintendency over inferior tribunals became vested in this Court from the time of its creation: Commonwealth v. Ickhoff, 33 Pa. 80, 81; Chase v. Miller, 41 Pa. 403, 411."

The *Carpentertown* case involved the writ of prohibition. In *Bell's Appeal,* 396 Pa. 592, 152 A. 2d 731 (1959), the case involved the common law writs of certiorari. The Supreme Court held that it was the only Court in Pennsylvania which could issue such a writ. It said:

"The historical modes for bringing a matter before the Supreme Court for review, when this court was the only tribunal exercising appellate jurisdiction, were writ of error, appeal and certiorari. See, e.g.

Lessee of M'Clemmons v. Graham, 3 Binney 88 (1810); Commonwealth v. Beaumont, 4 Rawle 366 (1834); Baker v. Williamson, 2 Pa. 116 (1845). These three separate methods for obtaining appellate court review were recognized and carried forward in the Constitution of 1874, by Article V, Section 3, which provided that the judges of the Supreme Court 'shall have appellate jurisdiction by appeal, certiorari or writ of error in all cases, as is now or may hereafter be provided by law.' "

It is respectfully submitted that if the Supreme Court of Pennsylvania possesses all of the powers of the King's Bench, it must also assume all of the duties thereof. Both of the foregoing cases quote a portion from Blackstone as follows:

"'Blackstone says, Book III, *42: "The jurisdiction of this court (of King's Bench) is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below."' "

However, the same quotation from Blackstone, goes on to say at *43:

"For this court (still referring to the King's Bench) is likewise a court of appeal, into which *may be removed* by writ of error all determinations of the court of common pleas, and of all inferior courts of record in England and to which a writ of error lies also from the court of king's bench in Ireland[36]. Yet even this so high and honorable court is not the dernier resort[37] of the subject, for, if he be not satis-

fied with any determination here, he may remove it by writ of error into the house of lords, or the court of exchequer chamber, as the case may happen, according to the nature of the suit and the manner in which it has been prosecuted.[38]"

Footnote [36], referred to therein, states,

"[36] Upon certiorari under section 47 of the 2d Rev. Statutes, p. 49 providing that 'Whenever any authority shall be exercised by any of the officers pursuant to any provision of this title, the proceedings may be removed into the Supreme Court, by certiorari and there examined and corrected.' *The authority and duty of such court is to review and correct all errors in matters of law committed in the exercise of this extraordinary jurisdiction* and not simply to review the record of the proceedings in the nature thereof, brought to it upon such writ. Morewood v. Hollister, 2 N.Y. App. (Seld) 309, 312 (1852). A certiorari lies upon all final adjudications of an inferior court or officer invested by the legislature with power to decide on the property or rights of citizens and which court or officer acts in a summary way or in a new course different from the common law. Stone et al. v. The Mayor, etc. of N.Y., 25 Wend 157, 167 (1840)."

It is respectfully submitted that at common law, litigants had the *right* to remove a case to the King's Bench for the correction of errors of law and that they were not required to obtain the *permission* of that court to so remove the proceedings.

It is respectfully submitted that citizens of Pennsylvania inherited such right at common law and that such

right was recognized by the Supreme Court from its creation until April 1, 1964. It is further respectfully submitted that if such right was not a part of the common law of England, it became a part of the common law of Pennsylvania by the many times it has been applied prior to April 1, 1964.

It is also respectfully submitted that this common law right became a privilege or immunity which could not be taken away by a rule of court and that the attempt to do so was an abuse of due process. The appellant prays that your Honorable Court will so hold and will remand the case to the Supreme Court of Pennsylvania with directions to accept an appeal in the nature of a broad certiorari and to proceed thereafter in accordance with law.

(b) *The appellant is not estopped from raising the question of the unconstitutionality of Rule 68 1/2.*

It is a general rule of Constitutional Law that a litigant is not permitted to avail himself of some procedural step and at the same time contend that it is unconstitutional. This is in the nature of an estoppel and is based upon the theory of waiver.

However, it has been universally recognized that such a waiver must be voluntary and that if it is not voluntary the rule does not apply. It was said in *Commonwealth vs. Kilgallen*, 379 Pa. 315 at 325, 108 A. 2d 780 (1955),

> "A waiver of constitutional right must be voluntary. It is not voluntary when made under judicial compulsion."

It is respectfully submitted that the filing of a petition by the appellant under Rule 68 1/2 was the result of

judicial compulsion. There was no other method by which the appellant could bring its case before the appellate court. It is therefore respectfully submitted that it was not estopped from raising the question of the constitutionality of Rule 68 1/2.

(c) *Even if Rule 68 1/2 was not unconstitutional, the denial of appellant's petition was in itself an abuse of due process.*

It is respectfully submitted that even if Rule 68 1/2 should not be held to be unconstitutional, the questions raised by the appellant's petition for allowance of a special certiorari were so substantial that the denial of its petition was in itself an abuse of due process.

The appellant is a Pennsylvania Township of the First Class and its attempt to upgrade its zoning requirements in an E Business District were frustrated by the order of the lower court, which held that the amended ordinance was unconstitutional, not only as to the property of the appellees, but unconstitutional in general.

It is respectfully submitted that such an important question deserves to be decided at a state-wide level and not at a county-wide level. There are fifty-nine (59) judicial districts in Pennsylvania each of which is of equal authority. The decision of the Court of Common Pleas of Delaware County, which composes the 32nd Judicial District is not binding upon any of the other fifty-eight districts. Therefore it is highly probable that the same ordinance, word for word, might be held constitutional in Montgomery County which adjoins Delaware County.

Questions Are Substantial

While it is understandable that the Supreme Court of Pennsylvania has been faced with problems in handling the appeal load, it is respectfully submitted that the area of zoning review is sufficiently important not to permit the numerous Courts of Common Pleas to establish unappealable conflicting decisions as a by-product to the elimination of zoning appeals by broad certiorari.

(d) *Ordinance No. 786 of Springfield Township, amending the section of its Zoning Ordinance relating to the E Business District, is not repugnant to the Constitution of Pennsylvania or the Constitution of the United States.*

The enactment of Ordinance 786 of Springfield Township was not an isolated piece of legislation, hurriedly adopted to forestall the building plans of the appellees, but was the next logical step in the Township's endeavors to strengthen and improve its Zoning Ordinance in an orderly manner.

Since the issuance of the Report of the Springfield Township Planning Commission in 1957, the Board of Commissioners of the Township have regularly and systematically endeavored to modernize the Zoning Code and incorporate the general and specific recommendations therein made. The Planning Commission of Springfield Township is a statutory body consisting of five persons created under the authority of the Act of 1931, June 24, P. L. 1206 (53 P.S. 58201). This Commission, prior to 1957 and since that time, has had as its Planning Staff the professional services of the Government Consulting Service of the Institute of Local and State Government

of the University of Pennsylvania. The Planning Commission is charged by the Legislature to make recommendations with respect to any and all matters within its jurisdiction and, in so doing, is obliged to *"have regard for the present conditions and future needs and growth of the township"* (53 P.S. 58202). As a result of the recommendations made by the Planning Commission in 1957, and subsequently, the Board of Commissioners engaged themselves in an energetic long range program to implement such zoning, public improvements and civic schemes. Although there were many changes made in the substantive sections of the zoning code and many changes in the map involving zoning districts, some of the most important implementations were as follows:

June 18, 1957 (Ord. No. 598)—Creation of a new Shopping Center business district designed to eliminate old-fashioned strip business zoning on major arteries, confine certain business to well buffered designated areas and supply adequate off-street parking to multiple businesses.

July 30, 1957 (Ord. No. 600)—Establishment of a comprehensive advertising sign control ordinance under zoning.

January 13, 1959 (Ord. No. 635)—Creation of a new Special Use District designed to attract large single concern office buildings, research institutions and general non-retail business outlets.

January 13, 1959 (Ord. No. 636)—Establishment of Board of Adjustment Rules, business buffer areas, business side and rear yards, height regulations, controls relative to business spreading on residential

streets, and elimination of out-moded business classifications such as "blacksmith", etc.

January 13, 1959 (Ord. No. 637)—Providing for the application and issuance of zoning use permits.

February 24, 1959 (Ord. No. 641)—Major changes in the zoning depth of business on Baltimore Pike, shifting of zoning districts to meet changing economic needs for business and residential, and complete surveying and establishment of zoning districts by metes and bounds.

May 10, 1960 (Ord. No. 660)—Increase in size of planting strips.

July 25, 1961 (Ord. No. 703)—Creating Shopping Center District for Strawbridge & Clothier, Baltimore Pike & Woodland Ave.

December 10, 1963 (Ord. No. 747)—Complete revision of Apartment District regulations.

The above changes in the zoning code along with the other 38 changes (a memorandum of which has been supplied to the Court), together with careful review of applications for special exceptions and variances by the Board of Adjustment, have accomplished measurable progress in the development of Baltimore Pike by encouraging substantial business institutions to locate on this major artery for vehicular traffic. The most significant aspects of the substantial business institutions located on Baltimore Pike are (1) that they have frontage in excess of 250 feet, (2) they have depth in excess of 300 feet, (3) all have become established, with one or two exceptions, since 1957 and since the zoning code has been amended in recent years

for the specific purposes of providing zoning depth for off-street parking and the establishment of tracts large enough to sustain comparatively large buildings, (4) old non-conforming uses are being eliminated, through consolidation of small lots. Business enterprises such as Strawbridge & Clothier, Springfield Dodge Agency, Pancake House, Dick Barone Chevrolet, Countryside Ford, Block Distributors, Alpine Inn, A & P, Hillside Plymouth, Springhaven Motel (as modernized) are the direct result of sound planning on the part of the Planning Commission and the Board of Commissioners, their recognition of economic changes in merchandizing, automobile use and requirements of the citizens, and the implementation of these factors in modern zoning regulations. The Ordinance in question, in reality, is not new or arbitrary. It is the mere characterization in regulation form of present day standards for economic survival in a competitive market.

When zoning as we know it today began in the 1920's the basic tools were the setting up of certain standard districts such as residential, business and industrial. The corner drug store concept was in vogue. Business zoning was designed for normal lot depths of about 100 feet on the "main" street or streets and it was thought to be wise to allow business zoning at the corners of main street intersections even though the land might be vacant and zoned residentially from the corners along the intersecting streets. Every suburban community in the instant metropolitan area that had such horse and buggy zoning and did not heed the subsequent economic, merchandizing, transportation, and social changes but steadfastly adhered to the old concepts or attempted a zoning

housecleaning after the fact has suffered serious economic blight and has undergone, nevertheless, changes not by systematic plan but by economic and social force completely inconsistent with the original "zoning plan". It is only by keeping pace with the social and economic changes that zoning can be effective and carry out its purposes as provided in the enabling act, to wit, lessen congestion in the streets, secure safety from fire and other dangers, promote health and the general welfare, prevent overcrowding of land, provide adequate light and air, avoid undue concentration of population, facilitate the adequate provision of transportation and other public requirements, conserve the value of buildings and *encourage the most appropriate use of land.* Static zoning, whether it is in respect to use, district or planning concept, is municipal suicide since it negates the basic truth that "times change".

The Ordinance in question established, inter alia, mimimum frontages and areas and was a full and complete revision and modernization of the entire section of the Code dealing with E Business. Prior to the passage of this Ordinance, the Board had established minimum frontage (70 feet), minimum area (8500 sq. ft.), rear yard (25 feet), front set back (40 feet), building area limitations (33 1/3%) and minimum side yards (10 feet and 20 feet) for A Residential Districts. In respect to D Residential Apartment Districts there had been established (December 1963) minimum set back (40 feet), side yards (20 feet), building area limitations (25%), rear yard (40 feet), frontage (80 feet) and lot area (3000 sq. ft.). Similar provisions had been made for Special Use Districts, to wit, minimums of area (3 acres) (7 acres for a hospital), frontage (300 feet), building area (20% to 35%), street set back

(50 feet), side or rear yard (30 feet), planting strip (30 feet) building line for hospital (100 feet), building line from residential district (50 feet) and building separation (20 feet). Likewise there were minimums provided in Shopping Center Districts, to wit, building area (20%), building line (100 feet), planting strip (35 feet), over-all plan review, and building separation (12 feet). The E Business District was the only remaining District that had not been completely overhauled with the exception of the Industrial District (which has been receiving re-drafting attention for the past two years). The E Business revision or modernization had been under consideration for a year and one-half before final adoption.

The Ordinance in question consists of a complete revision of the previously existing section of the zoning code. The Court has been supplied with an analysis of the changes and it will serve no purpose to reproduce the same. Special attention is called, however to the following changes:

(1) The building area limitation was reduced from 60% to 40%.

(2) Two side yards each of 25 feet were required in place of one of 10 feet.

(3) The front set back was increased from 15 feet to 30 feet.

(4) The rear yard was increased from 15 feet to 50 feet.

(5) Lot area minimum of 50,000 sq. ft. established where there was no previous control.

(6) Lot frontage minimum of 175 feet established where there was no previous control.

Questions Are Substantial

(7) Buffer areas increased from 10 feet to 15 feet.

(8) Former uses by special exception for club Fraternity House or Lodge, place of amusement, hospital, sanatorium, hotel or restaurant provided for in one category prescribing frontage minimums of 250 feet and area minimums of 125,000 square feet.

(9) Public garage or motor vehicle use by special exception completely revamped.

(10) General elimination of special exception uses such as "community garage"; "stable"; "gas filling and battery service station"; "express, carting or hauling office or station"; "carpenter, cabinet making, furniture or upholstery shop, electrical shop, plumbing office or store of painter or paperhanger"; "laundry"; "storage house"; "newspaper or job printing, bookbinding and paper ruling"; "residential uses".

(11) Changing restaurant definition to increase building area from 400 sq. ft. to 2500 sq. ft., seating accommodations for 30 persons to 75 persons, excluding counter and bar facilities.

Ordinance No. 786 was formally proposed for enactment by the Board of Commissioners on December 7, 1965. The proposal was duly advertised and a public hearing held on December 28, 1965. On January 18, 1966 the Ordinance was enacted by the Board. On or about December 28, 1965 the Appellees herein filed their appeal with the Board of Adjustment. The said Ordinance was duly advertised in the issue of the Springfield Press dated January 27, 1966. On the evening of the same day the Board of

Adjustment held a hearing on the Appellees' application. Ordinance No. 786 became "effective" under the Act of June 24, 1931, P. L. 1206, Art. XV, Sec. 1502, Ch. I, II as amended (53 P.S. 56502) ten (10) days after said publication, or on February 7, 1966 and prior to the decision of the Board of Adjustment (March 4, 1966). No complaint relative to the legality of the said Ordinance was taken to the Court of Quarter Sessions under the Act of 1931 aforesaid.

When Appellee Samuel R. Green, on May 11, 1965, applied to the Building Inspector for a use registration and zoning permit he was not entitled to the issuance of the same. This fact has never been disputed. The zoning code as then composed prohibited the desired use except by the grant of a special exception under conditions and qualifications provided in the Code and through the issuance of a variance for a portion of the property. The record also shows that Samuel R. Green lacked any right in making the application (although this error may have been belatedly cured by recent testimony before this Court). In any event there was no vested right in the permit and no basis whatsoever for issuance of mandamus. The application was a necessary first step in the procedural zoning law toward the application to the Board of Adjustment with whom lay the authority to grant or deny the subsequent request for special exception and variance.

The instant case is squarely controlled by *A. N. "Ab" Young Company Zoning Case,* 360 Pa. 429 (1948). In this case the property owner filed an application for a permit. It was granted by the Inspector and then revoked. The applicant did not appeal the revocation. Several weeks later an ordinance was introduced which would prohibit

the requested use. The owner again applied for a permit and it was refused, on the ground that an amendatory zoning ordinance was then pending. The first permit application was on March 27, 1947, the second on June 4, 1947. The amendatory ordinance became effective on July 28, 1947.

The appellee contended that because he had filed his application for a permit prior to the effective date of the amendatory ordinance he acquired a vested right to secure the permit, which right could not be taken away retroactively.

The case headnote succinctly sets forth the holding:

> "An application by a property owner for a permit for the erection of a building in compliance with existing law confers no vested right as of that time, and the application may be refused or the permit revoked because of an ordinance passed after the date of the application, unless the holder of the permit does something of a substantial character toward construction, in good faith, before the enactment of the new zoning ordinance."

Although the *Ab Case* controls the issue, it is clear that the present appellee does not even begin to approach the status of the appellant in the *Ab Case* since they could not at the time of the application comply with the then existing zoning ordinance and at no time prior to the enactment of the amendatory ordinance comply with the same. While in the *Ab Case* the appellant slept on his rights to mandamus, the present appellees never had a bed to catch even forty winks.

The *Ab Case* has been consistently followed and cited in a series of Supreme Court Cases (8) and in a number of lower court cases. These cases are briefly outlined as follows:

(1) *Harrisburg v. Pass*, 372 Pa. 318 (1953):

An application for a permit for a motel was filed on March 9, 1950. There was no zoning ordinance prohibition at that time. Neighbors filed a bill in equity to enjoin construction and the applicant sought mandamus relief. The lower court enjoined the applicant from erecting the motel but ordered the city to issue the permit. The permit was issued on September 7. On October 3 the city enacted zoning legislation that prohibited the originally requested use.

The Court cited the *Ab Case* in holding that in order to enable the owner to claim a vested right which would protect him against a subsequently enacted zoning ordinance, he must establish that his expenditures were made in reliance on a building permit previously issued to him, that they were made before the enactment of the new zoning ordinance, and that they were substantial in amount. The Court upheld the amendatory ordinance.

(2) *Aberman v. New Kensington*, 377 Pa. 520 (1954):

On the day the appellant applied for a building permit a zoning commission created several months earlier filed a report to City Council where a hearing was to be held seven days later. The appellant filed a mandamus complaint on May 4th. The amendatory zoning ordinance was introduced formally in Council on June 9th, finally enacted on July 8th and became effective on July 18th.

The mandamus matter was not disposed of until the following year in February, seven months after the ordinance had been in effect. The Court upheld the zoning amendment and the municipality, even though the application for the permit was made when the intended use conformed to existing zoning regulations, citing the *Ab Case*.

(3) *Shender v. Zoning Board of Adjustment*, 388 Pa. 265 (1957):

Shender applied for a permit for a use then fully permissible under the zoning code. His application was denied on the basis of an amendatory ordinance (which ordinance was later deemed defective due to lack of sufficient public notice prior to enactment). A second application was refused on the strength of the already held invalid ordinance. Shender then appealed to the Zoning Board with a hearing set for November 9th. On November 17th an amendatory ordinance was introduced. On November 28th the Zoning Board denied the permit and Shender appealed to the lower Court on December 13th. The amendatory ordinance was enacted on December 30th.

The lower court ordered the grant of the permit and the Supreme Court reversed citing the *Ab Case*. The Court stated that "but for the technical defect of notice", the first amendatory ordinance was proper. "*No permit* had been issued and relied on, in good faith, to the substantial detriment of the holder of the permit."

The Court went on to state as follows:

> "Nor is this invalid as special legislation directed at the particular property, as contended by appellee. The original amendatory ordinance applied to all land

in the area, of which appellee's premises were only a part; and the classification suited the area."

(4) *Hertrick Appeal*, 391 Pa. 148 (1958):

In this case the Borough of Green Tree introduced a change in the procedure necessary to obtain a building permit by increasing the number of consents required from land owners in the area (80%) at the time when the Borough was appealing a Board of Adjustment decision in favor of the property owner. The lower court upheld the Board of Adjustment under the previously existing zoning procedure. The *Ab Case* and its rule of law was referred to but distinguished. The Court states that the *Ab Case, Shender, Aberman* rule was designed to prevent the creation of what would become a non-conforming use after the effective date of a pending zoning ordinance. The Court upheld the property owner and added that "an application for a building permit should not be affected by an amendatory ordinance enacted after the application was filed when the ordinance does not upgrade land use."

(5) *Schechter v. Zoning Board of Adjustment*, 395 Pa. 310 (1959):

This case deals with the erroneous issuance of a permit and subsequent efforts on the part of the municipality to revoke the permit. The rule of the *Ab Case* is cited and the municipality was upheld in its action to annul the permit despite expenditures by the property owner.

(6) *Lhormer v. Bowen*, 410 Pa. 508 (1963):

This is a mandamus action. The Esso Company secured an option on land for the construction of a gasoline service station which was a permitted use. A permit ap-

plication was refused and mandamus was instituted on April 5th, 1962. The only ground for refusal was that there was an amendatory ordinance pending. Such an ordinance was submitted to Council on June 12, 1961 and it was referred to the Planning Commission. The amendatory ordinance which would prohibit the use in question was introduced formally on April 11, 1962, a public hearing held on May 7, 1962 and enactment occurred on May 14, 1962. The Court held the amendatory ordinance not to be "pending" on the date of permit application and distinguished this case on the facts from the *Ab Case* and the *Aberman Case*. The ordinance was also held to be ineffectual due to lack of compliance with statutory procedure relative to the holding of public hearings. The Court held that the right to issuance of a permit by writ of mandamus was clear.

This case is clearly distinguishable from the matter before the Court in that the right to the permit by Esso was clear and the issuance thereof was a ministerial act admitting no discretion on the part of the municipal officers. In the case at bar the administrative officer had no right whatsoever to issue a permit under the then existing zoning ordinance—a permit was issuable only by the Board of Adjustment after proper application, advertising, public hearing and decision under the rules, regulations and controls of the zoning code itself.

(7) *Verratti v. Ridley Township*, 416 Pa. 242 (1965):

This is another mandamus case involving a gasoline station. The use was permitted under the zoning code. Application was made on January 23, 1962 and a second application was made on March 9, 1962. On June 26, 1962 the property was rezoned residential with no proof of the

manner of giving public notice. The mandamus action was filed on June 13, 1962. The Court held the facts of the *Lhormer Case* to control and distinguished the *Ab Case.*

(8) *Penn Township v. Yecko Bros.*, 420 Pa. 386 (1966):

In this case the Township had considered the advisability of adopting a zoning ordinance for approximately three years. This ordinance was enacted on August 13, 1962 to be effective on August 23, 1962. On July 2nd the equitable owners under an Agreement of Sale began to operate a business on the premises prohibited by the zoning ordinance subsequently adopted. The Court cited the rule in the *Ab Case, Harrisburg Case, Aberman Case, Schechter Case, Shender Case, Hertrick Case,* and *Verratti Case* in the following manner:

> "The rule that arises from these cases is that a property owner who is able to demonstrate (1) that he has obtained a valid building permit under the old zoning ordinance, (2) that he got it in good faith and that is to say without 'racing' to get it before a proposed change was made in the zoning ordinance—and (3) that in good faith he spent money or incurred liabilities in reliance on his building permit, has acquired a vested right and need not conform with the zoning ordinance as changed."

The Court found "racing" and lack of good faith on the part of the equitable owners.

The Appellees seek to bring their case within the rationale of the *Lhormer Case* and *Verratti Case.* Both of these cases were matters involving mandamus where the

"right" to the permit under the existing zoning ordinances was clear and involved simple ministerial acts. Such is not the case at bar. Appellees required not only a special exception but a variance for the rear section.

There is a presumption that a zoning ordinance is valid. *Archbishop O'Hara's Appeal*, 389 Pa. 35. The ordinance is not rendered invalid merely because it may depreciate the value of property or foreclose certain uses. In view of the testimony concerning other permissible uses and uses by way of special exception available for the property in question under the amendatory ordinance there is no possibility of confiscation nor indeed any lessening of value. The ordinance is uniform and applies to all properties within the E Business District without limitation. The regulations are not unusual but are typical of suburban zoning. Lower Merion provides a minimum lot area of 90,000 square feet in its RAA District, frontage of 90 feet in RAA, RA and R1 and 175 feet frontage in one of its commercial zones.

Testimony concerning legal hardship on the part of appellees is restricted to personal desires and completely insufficient to meet the tests laid down by the Supreme Court. There is no hardship which is of an unnecessary nature, peculiar or special to the *property* involved.

The amendatory zoning upgrades the area and will enhance property values. By increasing frontages, area, set backs, rear yards, side yards it will substantially enhance the general welfare, contribute to traffic safety, control highway access, facilitate fire handling, and contribute to the economic growth of not only the immediate neighborhood but the community as a whole.

Questions Are Substantial.

Zoning ordinances establishing minimum frontage and minimum area requirements in residential districts have been held constitutional both in Pennsylvania and throughout the United States.

In *Bilbar Construction Co. v. Easttown Township Board of Adjustment*, 393 Pa. 62, 141 A. 2d 851 (1958), the zoning ordinance provided that in "A" residence districts a single family dwelling was permitted on a lot with a minimum area of not less than 43,500 square feet (one acre) and having a frontage of 150 feet. For less restricted districts, the minimum lot area and frontage were scaled down. These requirements were upheld since they bore a reasonable relation to health and safety.

See also *Volpe Appeal*, 384 Pa. 374, 121 A. 2d 97 (1956).

It is respectfully submitted that the same considerations are applicable to business districts and that minimum area and minimum frontage requirements in business districts are likewise constitutional.

It is further respectfully submitted that the Court of Common Pleas of Delaware County erred in holding that Ordinance 786 was unconstitutional generally, thus affecting all other E Business properties in the Township.

VI. CONCLUSION

It is respectfully submitted that a rule of the Supreme Court of Pennsylvania which abolished the right of appeal in the nature of a broad certiorari in actions involving the constitutionality of zoning ordinances which had theretofore existed as a part of the common law of the Commonwealth of Pennsylvania, and in lieu thereof, substituted the requirement of a petition for the special allowance of such an appeal, is repugnant to Section 1 of the 14th Amendment of the Constitution of the United States as an abridgment of the privileges or immunities of citizens of the United States or as a deprivation of property without due process of law.

It is respectfully submitted that the fact that the appellant filed a petition for this special allowance of an appeal from an action involving the constitutionality of an amendment to its Zoning Ordinance does not estop it from raising the question of the constitutionality of the Supreme Court ruling because it was compelled to invoke such rule, not by choice, but only because such procedure was the only method which it could follow in order to present its case to the Supreme Court.

It is respectfully submitted that, if the rule of the Supreme Court of Pennsylvania was not unconstitutional, the action of the Supreme Court of Pennsylvania in denying the appellant's petition for the special allowance of an appeal, and the denial of a timely petition for the reconsideration thereof, was repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States as an abridgment of the privileges or immunities

of citizens of the United States or a deprivation of property without due process of law.

It is respectfully submitted that Ordinance 786 of the Township of Springfield, Delaware County, Pennsylvania, amending its Zoning Ordinance relating to the E Business District was not repugnant to the Constitution of Pennsylvania or the Constitution of the United States; that the Court of Common Pleas of Delaware County, Pennsylvania, erred in holding that it was unconstitutional, and was particularly in error in holding that it was unconstitutional generally, thus affecting all other E Business properties in the Township; and that the Supreme Court of Pennsylvania erred in denying that the appellants petition for the special allowance of an appeal so that the legal questions involved would have state-wide application, rather than the strong probability of divergent decisions by county courts with equal jurisdiction.

It is respectfully submitted that the questions presented by this appeal are substantial in that they have never been decided by either your Honorable Court or by the Supreme Court of Pennsylvania, and involve the health, safety and general welfare of citizens of the Township of Springfield and of similar communities in Pennsylvania.

It is further respectfully submitted that they require plenary consideration, with briefs and oral argument for their resolution.

For the foregoing reasons, the appellant prays your Honorable Court to note probable jurisdiction.

Respectfully submitted,

READ ROCAP, JR.,

Attorney for the Township of Springfield, Appellant.

APPENDIX "A"

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA

No. 3981, Year 1966, Zoning

In re: Appeal of Ida May Green, Owner, and Samuel R. Green, Leslie D. Green and Russell F. Green, Tenants, From the Findings and Order of the Township of Springfield, Delaware County, Pennsylvania

R. Winfield Baile, Esq., for Appellant.

Read Rocap, Esq., for the Township.

OPINION

This matter is before the Court en banc on briefs and, having been argued, is ready for decision.

Additional testimony was taken before Sweney, P. J., and, as a consequence, we must decide this case de novo. From the testimony and the pleadings we make the following:

FINDINGS OF FACT

1. Ida May Green has been the owner since 1947 of the property known as 754 Baltimore Pike, Springfield,

Pennsylvania. This is a vacant piece of land situate on the north side of Baltimore Pike beginning at a point seven hundred eighty-four and forty-two one-hundredths (784.42′) feet east from the easterly side of Woodland Avenue. It contains a frontage of two hundred (200′) feet by a depth from the north side of Baltimore Pike of approximately five hundred seventy-five (575′) feet.

2. By lease dated April 21, 1965 Ida May Green leased the property to her sons, Samuel R. Green, Leslie D. Green and Russell F. Green for a term of five years. The said lease includes a restaurant building, with bar facilities, which Ida May Green proposes to build on the property and from which the three sons as a partnership will conduct a restaurant and bar as a business enterprise.

3. The partnership, consisting of the sons, made application to the Pennsylvania Liquor Control Board for a liquor license. As a result of protest filed in opposition to the application by Lawrence G. Williams, President of the Board of Commissioners of Springfield Township and by Heritage Village, Inc., a hearing was held on July 2, 1965. As a result of that hearing, the partnership, consisting of Samuel R. Green, Lesile D. Green and Russell F. Green, was granted a liquor license.

4. On May 11, 1965, Ida May Green and Samuel R. Green, acting for himself and for his brothers, made application to the Building Inspector of the Township of Springfield, for a Use Registration Permit and for a Zoning Permit to allow the use of the subject property and the proposed building to be built thereon as a restaurant and cocktail lounge.

5. On May 14, 1965, the Building Inspector, in writing, refused to grant said Zoning Permit and Use Registration Permit.

6. The Springfield Township Zoning Ordinance of 1938 as of May 11, 1965 provided (Section 502) that, in an E Business District, that a building may be erected and a lot may be used for the purpose of a restaurant when authorized as a special exception by the Board of Adjustment.

7. As of May 11, 1965, the Zoning Ordinance had no provision for frontage or area except the provisions providing for a side yard, rear yard and setback and further providing that not more than sixty (60%) percent of the total area shall be occupied by buildings.

8. Since the subject property is located in the E Business District, on October 28th, 1965, the Greens appealed to the Board of Adjustment from the decision of the Building Inspector and made application for a special exception to permit the desired use of the subject property.

9. The Board of Adjustment fixed a public hearing to be held on November 22, 1965 in the Township Building, and due public notice of the said hearing was published in newspapers as required by the Zoning Ordinance.

10. The hearing was held as scheduled and advertised at which time these appellants were present, prepared to present their case. Other residents of the Township of Springfield were also present.

11. Upon advice of the Township Solicitor, who pointed out that, in his opinion, the application for a

special exception was defective in form, the Board of Adjustment, by its Chairman, ruled: "It is the Board's decision that inasmuch as this has not been properly filed, we will not hear this case pending the filing of the proper Petition."

12. Following the hearing on November 22nd, 1965, an amendment to the Zoning Ordinance of 1938 was submitted to the Board of Commissioners of Springfield Township at a meeting held on December 7, 1965. The Commissioners, by resolution, fixed Tuesday, December 28, 1965, at 8:00 p.m., in the Township Building, as the time and place of a public hearing thereon and instructed that notice be given as provided in the said Zoning Ordinance.

13. The hearing was held as advertised following which the Board of Commissioners enacted the said amendment on January 18, 1966. The enactment was advertised in the Springfield Press on January 27, 1966 and, according to law, became effective ten days thereafter, or on February 7, 1966.

14. That amendment, as by reference thereto will appear, provided that no building shall exceed two stories in height; that not more than forty (40%) per cent of the total area shall be occupied by buildings; that there shall be two (2) side yards, one (1) on each side of the building, neither of which shall be less than twenty-five (25′) feet; that there shall be a setback of thirty (30′) feet; that there shall be a rear yard of not less than fifty (50′) feet; and that the lot area shall be not less than fifty thousand (50,000) square feet and a lot frontage of not less than one hundred seventy-five (175′) feet. In addition, it listed restaurants with clubs, fra-

ternity houses or lodges, places of amusements, hospitals or sanitariums or hotel, and provided that in each such case the lot area shall not be less than one hundred twenty-five thousand (125,000) square feet and the frontage be not less than two hundred fifty (250′) feet.

15. Following the hearing on November 22, 1965 these appellants filed a petition with the Board in which they appealed from the decision of the Building Inspector in refusing to issue a Use Registration and a Zoning Permit. In addition, they applied for a special exception, variance and other relief on constitutional grounds from the terms of the Zoning Ordinance and its amendments as they relate to the subject property.

16. After a hearing before the Board on January 27, 1966, The Board of Adjustment on March 4, 1966 entered an Order dismissing the appeal and denying the request for variance or other relief.

17. At that hearing the applicants presented plans for their restaurant. It would have a seating capacity of one hundred ninety (195) people and the building itself would cover six thousand three hundred fifty (6,350) square feet or approximately ten (10%) per cent of the business zoned area, two (2) side yards each forty-seven (47′) feet in width and a rear yard within the Business District of one hundred sixty-two (162′) feet with a buffer planting area fifteen (15′) feet wide in the rear were shown. The building itself would be set back (80′) feet from Baltimore Pike. Off street parking facilities were provided for one hundred nine (109) cars in the E District area and one hundred six (106) cars for future use in the Business District.

18. At that meeting the applicants amended their petition and asked for a variance from the terms of the Zoning Ordinance to permit the use of the rear portion of the subject property, which is now zoned B Residential, as a parking lot to be used in conjunction with the restaurant and cocktail lounge.

19. The proposed building would be masonry construction and there would be a facade of five wood columns to put in a covered entrance. The main floor would contain a vestibule, foyer, coatroom, lavatories, office, bar, dining room, kitchen, trash room, refrigeration and storage rooms. The basement would contain locker areas, storage areas and employees' toilets.

20. In short, the proposed building more than meets all of the requirements of the Zoning Ordinance except lot area and front footage.

21. The Board of Adjustment denied the application on the grounds that the proposed use is not a permissible one because the lot area is less than one hundred twenty-five thousand (125,000) square feet and the frontage is less than two hundred fifty (250') feet.

22. From the east boundary to the west boundary along Baltimore Pike, in Springfield Township, there are approximately fifteen (15) restaurants. Of these, only one meets the requirements of the new Ordinance both as to area and frontage. The others range in lot area from sixteen thousand four hundred (16,400') feet to ninety-three thousand (93,000) square feet. As late as October, 1965, the Board of Adjustment of Springfield Township granted a special exception to the Sportsmen's Club. This is located at 204 Baltimore Pike—about five blocks away from the subject property. It has a frontage

of eighty (80') feet by two hundred ninety (290') feet, or a square foot area of twenty-three thousand two hundred (23,200') feet. The building area on the lot is four thousand eight hundred thirty-seven (4,837) square feet.

23. Lawrence G. Williams, President of the Board of Commissioners of Springfield Township, testified before the Pennsylvania Liquor Control Board in favor of a liquor license for the Sportsmen's Club. At approximately the same time, he wrote a letter to the Liquor Control Board protesting the granting of a license to the Greens.

24. The Township of Springfield is guilty of discriminating zoning practices against the Greens. When application was made to the Building Inspector in May of 1965 there were no area or frontage restrictions. When the hearing was held on the appeal on November 22, 1965 there were no area or frontage restrictions. That hearing, though duly advertised, did not take place because the Township Solicitor ruled that the application was defective in form. Within two weeks following that hearing an amendment was presented to the Township Commissioners which would forever prevent the Greens from using their lot as a restaurant.

25. The subject property has been vacant land since the enactment of the original Zoning Ordinance and there have not been any prior decisions of the Board of Adjustment which have affected this property except the ruling made on November 22, 1965.

26. The subject property is adaptable to the proposed use from a standpoint of location, surrounding area and highway access.

27. The proposed use for a restaurant and cocktail lounge is in keeping with the character of the area and is not in any way detrimental to the general welfare or to the health, safety or morals of the township of Springfield.

28. To permit the proposed use will not be contrary to the public interest. By so doing the spirit of the Zoning Ordinance shall be observed and maintained and substantial justice will be done to the appellants.

29. A restaurant is a permitted use under the Zoning Ordinance when authorized as a special exception. The Board of Commissioners of the Township of Springfield, therefore, have ordained that such use, when authorized by special exception, is not detrimental to the health, safety, morals and general welfare of the Township of Springfield.

30. To later impose more stringent restrictions upon the use of the subject property for restaurant purposes than have prevailed for many years, when those restrictions would deprive the appellants of the lawful and proper use of their property, is a discriminatory and confiscatory action which in no way serves the purpose and objective of the Zoning Ordinance, but rather serves to restrict trade, stifle competition and thwart free enterprise.

31. The proposed use of the subject property would be consistent and in harmony with the intent and purpose of the Zoning Ordinance.

32. The requirement that a restaurant should have two hundred fifty (250') feet of frontage and not less than one hundred twenty-five thousand (125,000) square

feet in area is an unreasonable, arbitrary, unnecessary, discriminatory and confiscatory requirement and has no relation whatsoever to the health, safety, morals or general welfare of the Township of Springfield.

33. Unless the use applied for is granted, irreparable hardship and damage will result to the appellants. They will be forced to sell land which they do not wish to sell because they cannot use it for their family business purposes—land which Ida May Green has owned for fifteen years, during all of which time its use for restaurant purposes was permitted by the Zoning Ordinance when authorized by a special exception without any other restrictions imposed by the latest amendment.

The appellants are the owners and tenants of the subject property located at 754 Baltimore Pike, Springfield, Delaware County, Pennsylvania. The subject property is vacant ground containing two hundred (200′) feet of frontage on the north side of Baltimore Pike and extending northwardly five hundred seventy-five (575′) feet. Ida May Green has owned this property since 1947.

The southerly portion of this tract is classified as "E Business" and the northerly two hundred seventy-five (275′) feet is "B Residence."

The Zoning Ordinance, as amended January 27, 1966, permits the use of land classifies "E Business District" for a restaurant or club, provided the lot area shall not be less than one hundred twenty-five thousand (125,000) square feet and the frontage be not less than two hundred fifty (250′) feet, when authorized as a special exception.

Except that the frontage of this property is only two hundred (200′) feet, the appellant's proposed use will

conform in every respect to the requirement of the Ordinance and did conform in all respects until the recent amendment of January 18, 1966.

Baltimore Pike, in the vicinity of the subject property, on both the north and south side of the highway and extending both east and west for substantial distances is a highly developed commercialized strip. Located on the Baltimore Pike within the Township are fifteen (15) Restaurants, only one of which complies with the area and frontage requirements of the amended Zoning Ordinance.

As recently as October 28, 1965 an applicant was granted permission by the Board of Adjustment to use a tract of ground on Baltimore Pike containing only twenty-three thousand two hundred (23,200) square feet and with a frontage of only eighty (80') feet, for the purpose of operating an eating and drinking establishment, and falling within the definition of "Restaurant" of the amendment.

Immediately to the west of the subject tract is an automobile agency; west of the auto agency is a restaurant located in front of a swimming club. Directly across the street from the subject tract are an amusement park, a restaurant, a used car lot and various other small commercial buildings. Immediately east of the subject tract is a Midas Muffler Shop. The use of the front portion of the subject tract for a restaurant of the type proposed by the appellants and the rear portion of the tract for parking of patrons is entirely in keeping with the surrounding and abutting uses.

While no doubt the proposed use will add an additional traffic pattern by establishing an exit from an

entrance to the subject property, so would any permitted use.

The highway in front of the subject property is a major U. S. Artery containing two east bound and two west bound lanes divided by concrete dividers. The total width of Baltimore Pike in front of the subject tract is one hundred (100') feet from right of way line to right of way line, approximately fifty (50') feet of which has been paved for vehicular traffic.

Generally zoning acts and ordinances are valid and constitutional, whenever they are necessary for the preservation of the public health, safety, morals or general welfare and are not unjustly discriminating, arbitrarily unreasonable or confiscatory in their application to a particular or specific piece of property. Lord Appeal, 368 Pa. 121.

On the other hand, an owner of property is entitled to certain inalienable constitutional rights of liberty and property. These include the freedom to use his property in any legitimate manner, within the framework of a constitutionally valid zoning regulation. Lened Homes, Inc. vs. Department of Licenses, 386 Pa. 50.

Thus, we are constantly balancing the rights of the individual against the public good or welfare. In so doing, we must be careful to prevent the overzealous public official from taking unto the bosom of government proprietary interests in the real estate of its citizens; we must be careful to see that the "public good and welfare" asserted in any individual case has a substantial chance to result from the application of the Legislative

demands of the government. While the burden of establishing the lack of constitutionality of the Zoning Ordinance is on the property owner, if the effect of the zoning law is to deprive the owner of a lawful use of his property, without thereby promoting the health, safety, morals or general welfare of the area, the zoning law constitutes a taking or confiscation of property without compensation or authority and is invalid.

The "public good and welfare" alleged to be derived from the questioned zoning legislation must not be imagined, fanciful, remote or insignificant, but must be reasonably defined by the evidence. Cleaver vs. Board of Adjustment, 414 Pa. 361; National Land and Investment Company vs. Easttown Township Board of Adjustment, 419 Pa. 504.

We hold that the zoning ordinance restricting the owners and tenants of this tract, containing three (3) acres of ground, more or less, with two hundred (200') feet of frontage on a major U.S. Highway from erecting a restaurant, is an unconstitutional and confiscatory Zoning Ordinance. Especially is this true, where as here, fronting on the same highway within the same Township there are thirteen (13) Restaurants which do not meet the minimum requirements of the questioned Zoning Ordinance and which do not have as much frontage or area as the appellants' property. The effect of this Ordinance is to deprive the appellants of a use of their property compatible with the immediate neighborhood. As a result it treats the appellants' land differently than similar surrounding land undistinguishable from it in character to the appellants economic detriment. Eller Zoning Case, 414 Pa. 1; Glorioso Appeal, 413 Pa. 194.

In determining the impact of zoning legislation on property as it relates to the general welfare, the nature, size and particularly the general character of the property, of the neighborhood, and of the district, are important factors which among others, must be considered by the zoning authorities. Cleaver vs. Board of Adjustment, 414 Pa. 367.

As a consequence, we enter the following:

FINAL DECREE

And Now, February 7th 1967, it is ordered and decreed that

1. The appeal of Ida May Green, owner, and Samuel R. Green, Leslie D. Green and Russell F. Green, tenants, is sustained;

2. This case is remanded to the Board of Adjustment of Springfield Township for the issuance of a proper special exception;

3. Each party shall pay his own costs;

4. An exception is noted for the Township.

By the Court,
Henry G. Sweney,
President Judge.

APPENDIX "B"

IN THE COURT OF COMMON PLEAS OF
DELAWARE COUNTY, PENNSYLVANIA

No. 3981 Year 1966, Zoning

In Re: Appeal of Ida May Green, Owner, and Samuel R. Green, Leslie D. Green and Russell F. Green, Tenants, From the Findings and Order of the Township of Springfield, Delaware County, Pennsylvania

R. Winfield Baile, Esq., for Appellant.

Read Rocap, Esq., for the Township.

ADDITIONAL OPINION

In checking the record in this case, we find that we failed to discuss and decide the fact that Appellants had not only requested a special exception for the erecting of a restaurant on their land but had requested a variance for the rear of their lot, which is zoned "residential" and will be entirely landlocked if a variance is not decreed. We are of the opinion that Appellants would suffer unnecessary hardship if the rear of their lot is not included in the land necessary for restaurant purposes and the parking of automobiles.

As a consequence, we amend Finding of Fact No. 18 to read as follows:

18. At that meeting the applicants amended their petition and asked for a variance from the terms of the Zoning Ordinance to permit the use of the rear portion of the subject property, which is now zoned B Residential, as a parking lot to be used in conjunction with the restaurant and cocktail lounge.

18(a) We find that the variance should be granted, as said land is necessary to be used in conjunction with the restaurant and for parking space and to refuse such variance would subject the Appellants to an unnecessary hardship, applicable to their particular land.

FINAL DECREE

And Now, February 23rd, 1967, it is ordered and decreed that the Final Decree, entered February 7th, 1967, is amended to read as follows:

1. The appeal of Ida May Green, owner, and Samuel R. Green, Leslie D. Green and Russell F. Green, tenants, is sustained;

2. This case is remanded to the Board of Adjustment of Springfield Township for the issuance of a special exception and a variance in accordance with this opinion;

3. Each party shall pay his own costs;

4. An exception is noted to the Township.

By the Court,
Henry G. Sweney,
President Judge.

APPENDIX "C"

SUPREME COURT OF PENNSYLVANIA
RULE 68½

"Where the subject matter does not fall within the Statutory jurisdiction of the Superior Court, an appeal to the Supreme Court in the nature of a certiorari from a judgment order or decree will lie only if specially allowed by the Court or by a judge thereof, where a statute expressly provides that there shall be no appeal from the decision or order or judgment or decree of a Court, or that the decision or order or judgment or decree of a Court shall be final or conclusive, or shall not be subject to review, or where the relevant statute is silent on the question of appellate review.

In all such cases, the appellant shall file within 30 days from the date of the decision or order or judgment or decree sought to be reviewed a petition, together with seven (7) copies thereof, in the office of the Prothonotary, setting forth the questions involved, a full statement of the facts, appellant's contentions and a citation of authorities which support them, and also a copy of every opinion, order, judgment and decree of the lower Court and the board or commission or agency which has been filed in the case. The appellant shall annex to his petition an affidavit that the application for certiorari is not being made for the purpose of delay. Appellant shall forthwith serve upon appellee, or his counsel, a copy

of the petition. The fee or fees payable to the Prothonotary for filing any such petition shall be the same as the fee or fees which would be charged by the Prothonotary in the case of an ordinary appeal. Within ten (10) day after service of the petition, the appellee shall file in the office of the Prothonotary an answer, together with seven (7) copies thereof, setting forth, if desired, a counter-statement of the questions involved and a counter-statement of the facts, if desired, and his contentions and a citation of authorities which support them. Appellee shall forthwith serve upon the appellant or his counsel a copy of his answer."

APPENDIX "D"

IN THE SUPREME COURT OF PENNSYLVANIA,
EASTERN DISTRICT

213 Misc. Docket No. 15

In Re: Appeal of Ida May Green, Leslie D. Green and Russell F. Green, from the Findings and Order of the Board of Adjustment of the Township of Springfield, Delaware County, Pennsylvania
No. 3961 of 1966
In the Court of Common Pleas of Delaware County Pennsylvania

PETITION FOR CERTIORARI UNDER PENNSYLVANIA SUPREME COURT RULE 68½

The Township of Springfield, by its Solicitor and Attorney, Read Rocap, Jr., Esquire, files its Petition for Certiorari under Pennsylvania Supreme Court Rule 68½ in the following manner and form:

I.

STATEMENT OF FACTS

1. The premises involved are situate on Baltimore Pike East of Woodland Avenue and are generally known

as 754 Baltimore Pike. The property has a frontage of 200 feet on Baltimore Pike, a westerly side depth of 575.54 feet, an easterly side depth of 581.78 feet and a rear line of 160.50 feet. The property is vacant land.

2. The subject property was acquired by Ida May Green in two parcels, the first on July 1, 1947 and the second on August 28, 1947. As of August 28, 1947 Ida May Green was the owner of property having a total frontage of 500 feet. On or about May 7, 1952 she sold 200 feet adjoining the subject property to the East and on or about February 23, 1954 she sold 100 feet adjoining the subject property to the West, leaving the subject property of 200 feet frontage intact since February of 1954.

3. The subject property is zoned "E" Business District for a depth of 350 feet from the Pennsylvania Highway right of way line and the balance of the property in the rear is zoned "B" Residence District.

4. The owner, Ida May Green, proposes to build a restaurant building with bar facilities on the subject property and lease the property to her three sons, Samuel R. Green, Leslie D. Green and Russell F. Green. A Lease Agreement dated April 21, 1965 provides that the lease would commence on the date of delivery of possession of the demised premises following approval of an application for a restaurant liquor license to the Lessees.

5. On July 6, 1965 the Pennsylvania Liquor Control Board held a hearing on the application of Samuel R. Green, Leslie D. Green and Russell F. Green for a restaurant liquor license. A hearing was held inasmuch as

the applications for new retail liquor licenses in Springfield Township exceeded the available openings under the quota of licenses provided by law. A protest in opposition to the aforesaid application was filed by the President of the Board of Commissioners of Springfield Township pointing out the proximity of other licensees. Neither the President or any township representative attended the hearing on July 6, 1965. The Pennsylvania Liquor Control Board subsequently granted a license, although the property has remained vacant.

6. On May 11, 1965 Samuel R. Green applied to the Building Inspector for a use registration and zoning permit for the subject premises to allow the use as a restaurant and cocktail lounge. On May 14, 1965 the Building Inspector denied the application on the ground that a Special Exception and Variance were required to be first issued by the Board of Adjustment.

7. As of May 11, 1965, the Springfield Township Zoning Ordinance provided (Section 502) that, in an E Business District, a building may be erected and a lot may be used for the purpose of a restaurant when authorized as a special exception by the Board of Adjustment under special circumstances and controls (Sections 801, 802, 803, 805 and 806).

8. As of May 11, 1965 a restaurant was not permitted in a "B" Residential District under the Springfield Township Zoning Ordinance.

9. As of May 11, 1965, the Zoning Ordinance had no provision for minimum frontage or minimum area in "E" Business Districts but there were provisions in regard to building height, side yards, rear yard, front

setback, screen planting strips and a provision that not more than sixty (60%) percent of the total area shall be occupied by buildings.

10. On or about October 28, 1965, Charles W. Letier, a restaurant designer and consultant, filed with the Township of Springfield (not the Board of Adjustment) an application not verified by oath in the form of a letter requesting the grant of a special exception. The matter was set down for a hearing by the Board of Adjustment on November 22, 1965. Since the application was not in proper form under the Rules and Regulations of the Board of Adjustment and was not filed by an owner or tenant or attorney representing either, under the authority of such Rules and Regulations the Board of Adjustment returned the application to Mr. Charles W. Letier with the suggestion that a new and proper application be filed with the Board of Adjustment.

11. On December 7, 1965, the Board of Commissioners proposed an amendment to the Zoning Code relative to Article I, Section 100(27) and Article V, "E" Business Districts, substantially changing both articles. The Commissioners, by resolution, fixed Tuesday, December 28, 1965, at 8:00 p.m. in the Township Building, as the time and place of a public hearing thereon and instructed that notice be given as provided in the said Zoning Ordinance.

12. The hearing was held as advertised following which the Board of Commissioners enacted the said Amendment on January 18, 1966. The enactment was advertised in the Springfield Press on January 27, 1966, and according to law, became effective ten days thereafter, or on February 7, 1966.

13. The amendatory ordinance in question was a further step in the modernization of the Zoning Code and represents one of a series of substantial zoning changes which began in June of 1957. The first draft of the amendatory ordinance in question was prepared in late October or early November 1965 and had been considered by the Board of Commissioners for approximately a year and a half before the same was formally and publicly proposed on December 7, 1965.

14. The Springfield Township Planning Commission in 1957 filed a comprehensive report recommending inter alia that business zoning be strengthened, that retail business classifications be more restricted, that the "ribbon" commercial development be contained and controlled more effectively and that the pattern of small retail developments be curtailed.

15. As a result of the recommendations made by the Planning Commission, as aforesaid, the Board of Commissioners made 47 changes in the Zoning Code, some of the most important changes being as follows:

June 18, 1957 (Ord. 598)—Creation of a new Shopping Center business district designed to eliminate old-fashioned strip business zoning on major arteries, confine certain business to well buffered designated areas and supply adequate off-street parking to multiple businesses.

July 30, 1957 (Ord. #600)—Establishment of a comprehensive advertising sign control ordinance under zoning.

January 13, 1959 (Ord. #635)—Creation of a new Special Use District designed to attract large single

concern office buildings, research institutions and general non-retail business outlets.

January 13, 1959 (Ord. #636)—Establishment of Board of Adjustment Rules, business buffer areas, business side and rear yards, height regulations, controls relative to business spreading on residential streets, and elimination of out-moded business classifications such as "blacksmith", etc.

January 13, 1959 (Ord. #637)—Providing for the application and issuance of zoning use permits.

February 24, 1959 (Ord. #641)—Major changes in the zoning depth of business on Baltimore Pike, shifting of zoning districts to meet changing economic needs for business and residential, and complete surveying and establishment of zoning districts by metes and bounds.

May 10, 1960 (Ord. #660)—Increase in size of planting strips.

July 25, 1961 (Ord. #703)—Creating Shopping Center District for Strawbridge & Clothier, Baltimore Pike & Woodland Avenue.

December 10, 1963 (Ord. #747)—Complete revision of Apartment District regulations.

16. The Ordinance in question established, inter alia, minimum frontages and areas for E Business Districts.

Prior to the passage of this Ordinance, the Board had established minimum frontage (70 feet), minimum area (8500 sq. ft.), rear yard (25 ft.), front setback (40 feet), building area limitations (33⅓%) and minimum side yards (10 ft. and 20 ft.) for A Residential Districts.

In respect to D Residential Apartment Districts there had previously been established minimum set back (40 feet), side yards (20 feet), building area limitations (25%), rear yard (40 feet), frontage (80 feet) and lot area 3,000 sq. ft.

Similar provisions had been made for Special Use Districts, to wit, minimums of area (3 acres, 7 acres for a hospital), frontage (300 feet), building area (20% to 35%), street setback (50 feet), side or rear yard (30 feet), planting strip (30 feet), building line for hospital (100 feet), building line from residential district (50 feet) and building separation (20 feet).

In Shopping Center Districts, provisions had been made for building area (20%), building line (100 feet), planting strip (35 feet), over-all plan review, and building separation (12 feet).

The E Business District was the only remaining District that had not been completely overhauled with the exception of the Industrial District. The latter Industrial District has been receiving drafting attention for the past two years and a proposed draft is presently before the Ordinance Committee for final approval.

17. The ordinance in question consists of a comprehensive and complete revision of the previously existing section of the Zoning Code. The lower Court was supplied with a full analysis of the changes, however, special attention is called to the following changes:

(1) The building area limitation was reduced from 60% to 40%.

(2) Two side yards each of 25 feet were required in place of one of 10 feet.

(3) The front setback was increased from 15 to 30 feet.

(4) The rear yard was increased from 15 feet to 50 feet.

(5) Lot area minimum of 50,000 sq. ft. established where there was no previous control.

(6) Lot frontage minimum of 175 feet established where there was no previous control.

(7) Buffer areas increased from 10 ft. to 15 ft.

(8) Former uses by special exception for club, fraternity house or lodge, place of amusement, hospital, sanitorium, hotel or restaurant provided for in one category prescribing frontage minimums of 250 feet and area minimums of 125,000 square feet.

(9) Public garage or motor vehicle use by special exception completely revamped.

(10) General elimination of special exception uses such as "community garage"; "stable"; "gas filling and battery service station"; "express, carting or hauling office or station"; "carpenter, cabinet making, furniture or upholstery shop, electrical shop, plumbing office or store of painter or paperhanger"; "laundry"; "storage house"; "newspaper or job printing, bookbinding and paper ruling"; "residential uses".

(11) Changing restaurant definition to increase building area from 400 sq. ft. to 2500 sq. ft., seating accommodations for 30 persons to 75 persons, excluding counter and bar facilities.

18. On December 28, 1965, the same day fixed for a public hearing on the new ordinance, Ida May Green, as owner, and Samuel R. Green, Leslie D. Green and Russell F. Green, as Tenants, filed an Appeal to the Board of Adjustment from the decision of the Building Inspector in refusing to issue a use registration and zoning permit, an application for a Special Exception and an application for a Variance.

19. After a hearing before the Board of Adjustment on January 27, 1966, the Board denied the application by Decree dated March 4, 1966. A copy of the detailed Opinion, Decree and Findings of Fact is attached hereto. The Board found that the applicants' proposed use did not meet the requirements of the Zoning Code as amended by Ordinance No. 786 enacted January 18, 1966 (prior to the hearing as aforesaid).

20. At the hearing before the Board of Adjustment the real estate experts testifying in behalf of the Applicants agreed that the property involved could be used for commercial purposes other than a restaurant and meet the zoning requirements, but that such other uses would not produce the most profitable use or the best economic return. Such other permissible uses under the Ordinance as amended on January 18, 1966 would be office building, medical clinic building, bank or other financial institution and retail store.

In addition to the foregoing uses there are many uses permitted by Special Exception that do not require the specific area and frontage requirements as are prescribed for restaurants, hotels, hospitals, clubs, fraternity houses, lodges and amusements.

21. The Board of Adjustment also held that Applicants Samuel R. Green, Leslie D. Green and Russell F. Green had no standing to appeal since there was no testimony showing they were tenants or had any interest in the land except as prospective tenants.

22. When the Applicants filed their appeal to the Board of Adjustment on December 28, 1965, they had notice of the pending Ordinance and were racing to obtain a Board of Adjustment decision before the Ordinance could be duly enacted.

23. There was no testimony offered to show hardship in respect to the land involved. Such testimony as was offered related to the person rather than to the property.

24. As a result of the Planning Commission recommendations in 1957, and careful review of applications for variances and special exceptions by the Board of Adjustment, substantial business institutions have been encouraged to locate on Baltimore Pike, a major artery for vehicular traffic. These institutions are similar in that they utilize frontages in excess of 250 feet, have depths in excess of 300 feet and have been established subsequent to the Planning Commission's recommendations of 1957.

25. When Appellant Samuel R. Green, on May 11, 1965, applied to the Building Inspector for a use registration and zoning permit he was not entitled to the issuance of the same. The Zoning Ordinance as then constituted prohibited the desired use except by grant of a special exception and variance under conditions and qualifications provided in the Zoning Code. There was no vested right in the permit and no basis for the issuance of mandamus.

26. The requirement that a club, fraternity house or lodge, place of amusement, hospital, or sanitorium, hotel or restaurant have a minimum area of 125,000 square feet and minimum frontage of 250 feet is reasonable and has a substantial relationship to the health, safety, morals and general welfare of the Township.

27. The present zoning is not confiscatory since there are numerous other uses for which the property can be developed requiring less area and a smaller frontage. Such elements as family relationship, personal inconvenience and lessened financial gain are insufficient tests in the determination of unconstitutional taking of property without compensation.

28. The ordinance is uniform in its application to all land within the zoning district in question and does not discriminate in respect to any specific piece of property.

29. From the standpoint of all of the present uses on the major artery in question, the ordinance in question is not new, arbitrary or capricious, but to the contrary is a mere characterization in regulation form of the majority of the modern types of establishments now being constructed.

30. The Ordinance in question conserves the value of buildings, encourages the most appropriate use of land, prevents the overcrowding of land, provides adequate air and light, avoids undue concentration of population, facilitates the adequate provision for transportation, lessens congestion in the streets, secures safety from fire and other dangers, promotes the health and general welfare and is specifically in accordance with the purposes

of zoning as provided by the Legislature in the zoning enabling act.

II.

APPELLANT'S CONTENTIONS

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1. The lower Court disregarded uncontroverted testimony and documentary evidence showing zoning changes made since 1957 as a result of Planning Commission recommendations and disregarded uncontroverted testimony concerning the consideration of the zoning ordinance in question for a year and one-half prior to adoption and preparation of a formal draft in October 1965.

2. The lower Court disregarded the fact that the ordinance in question was publicly submitted on December 7, 1965, advertised in the press on December 9th, 16th and 23rd, 1965 and enacted on January 18, 1966, about three weeks after the Public Hearing on December 28, 1965. The appellees did not appear before the Board of Adjustment for a hearing until January 27, 1966.

3. The lower Court improperly admitted irrelevant testimony concerning the Appellee's application for a liquor license and the protest by the President of the Appellant Board of Commissioners. The lower Court further gave weight to the letter protest of the said President but excluded from consideration the fact that no representative of the Appellant appeared at the Liquor Control Board hearing to protest the grant of a license.

4. The lower Court failed to find as a fact that the Building Inspector properly denied the application of

Samuel R. Green on May 15, 1965 for a zoning and use permit since a variance and/or special exception was required by the zoning ordinance.

5. The lower Court failed to find that the Board of Adjustment properly dismissed the application for a special exception on October 28, 1965, due to gross deviations from the Rules and Regulations of the said Board and due to the applicant (Charles W. Letier) not having any proper legal interest in the property involved.

6. The lower Court committed reversible error in considering a prior grant of a special exception for a private club (Sportsman's Club) where the facts and circumstances of the property there involved differed substantially from the present property in question. In addition, the lower Court failed to consider that the Board of Adjustment had granted the special Exception to the private club prior to the submission of the amending ordinance to the Board of Commissioners, prior to public advertisement of the ordinance and prior to the public hearing thereon.

7. The lower Court committed manifest error in finding that the Appellant was guilty of discriminating zoning practices against the appellees. The ordinance in question is uniform in its application to all properties located within the E Business Districts and represents a comprehensive and complete revision of an entire section of the zoning code.

8. The instant case is squarely controlled by A. N. "Ab" Young Company Zoning Case, 360 Pa. 429 (1948). In this case the property owner filed an application for a permit. It was granted by the "Inspector" and then

revoked. The applicant did not appeal the revocation. Several weeks later on ordinance was introduced which would prohibit the requested use. The owner again applied for a permit and it was refused, on the ground that an amendatory zoning ordinance was then pending. The first permit application was on March 27, 1947, the second on June 4, 1947 and the amendatory ordinance became effective on July 28, 1947. This case holds that an application by a property owner for a permit for the erection of a building in compliance with existing law confers no vested right as of that time, and the application may be refused or the permit revoked because of an ordinance passed after the date of the application, unless the holder of the permit does something of a substantial character toward construction, in good faith, before the enactment of the new zoning ordinance.

The instant case differs from the Ab case in that the present appellants at the time of their application *could not comply with the then existing zoning ordinance and did at no time prior to the enactment of the amendatory ordinance comply with the previous zoning ordinance.*

The Ab case has been consistently followed by the Supreme Court and the lower courts. See Harrisburg v. Pass, 372 Pa. 318 (1953); Aberman v. New Kensington, 377 Pa. 520 (1954); Shender v. Zoning Board of Adjustment, 388 Pa. 265 (1957); Schechter v. Zoning Board of Adjustment, 395 Pa. 310 (1959); Penn Township v. Yecko Bros., 420 Pa. 336 (1966).

9. The Appellees have sought to bring their case within the rationale of certain cases where the property owner had rights to the issuance of mandamus. The case at bar did not involve a situation where the Appellees had

a right to the issuance of a permit under the existing zoning. At all times material the Appellees required the issuance of a variance and special exception which involved a decision by the Board of Adjustment and not simple ministerial acts on the part of the Building Inspector.

10. The lower Court failed and refused to apply the presumption that a zoning ordinance is valid. Archbishop O'Hara's Appeal, 389 Pa. 35. To the contrary, the lower Court placed the personal convenience and the personal economic advantages of the Appellees over the legislative discretion of the Township Commissioners.

The Ordinance is not rendered invalid merely because it may depreciate the value of property or foreclose certain specified uses. In view of the testimony concerning other permissible uses and uses by way of special exception available for the property in question under the amendatory ordinance there is no possibility of confiscation nor indeed any lessening of value. The ordinance is uniform and applies to all properties within the E Business District without limitation. The regulations are not unusual but are typical of suburban zoning.

11. The testimony concerning legal hardship on the part of the Appellees is restricted to personal desires and is completely insufficient to meet the tests laid down by the Supreme Court of Pennsylvania. There is no hardship which is of an unnecessary nature, peculiar or special to the *property* involved.

12. The amendatory zoning upgrades the business area and will enhance property values. By increasing frontages, area, setbacks, rear yards and side yards it

will substantially enhance the general welfare, contribute to traffic safety, control highway access, facilitate fire handling and contribute to the economic growth of not only the immediate neighborhood but the community as a whole.

13. The lower Court ignored the fundamental concept of judicial administration that constitutional issues are to be avoided if litigation can be disposed of otherwise. The lower Court has placed itself in the position of a super Board of Commissioners and has legislated for the pecuniary benefit of a private individual.

14. The lower Court has held the minimum area and frontage to be unconstitutional per se without consideration of the E Business District as an entirety and without the slightest consideration to the many other uses the property can be used for on a permissible basis. See National Land and Investment Co. v. Easttown Township Board of Adjustment, 419 Pa. 504 (1965).

15. The lower Court granted a Variance for parking use of that large rear portion of the tract zoned B Residential, although the Appellees have no present plans to use the area and have merely referred to such area in the plans as and for "future parking".

III.

CITATION OF AUTHORITIES

A. N. "Ab" Young Company Zoning Case, 360 Pa. 429 (1948)

Harrisburg v. Pass, 372 Pa. 318 (1953)

Aberman v. New Kensington, 377 Pa. 520 (1954)

Shender v. Zoning Board of Adjustment, 388 Pa. 265 (1957)

Schechter v. Zoning Board of Adjustment, 395 Pa. 310 (1959)

Penn Township v. Yecko Bros., 420 Pa. 386 (1966)

National Land and Investment Co. v. Easttown Township Board of Adjustment, 419 Pa. 504 (1965)

IV.

QUESTIONS INVOLVED

---

1. Is a zoning ordinance constitutional which requires a minimum area of 125,000 square feet and minimum frontage of 250 feet for a club, fraternity house or lodge, place of amusement, hospital, sanitorium, hotel or restaurant in a business district?

(Answered in the negative by the lower Court.)

2. Does a property owner have any vested right to the use of a property for a restaurant under a zoning ordinance which requires a special exception and variance but requires no minimum area or minimum frontage in a situation where the zoning ordinance is amended comprehensively and inter alia includes the aforesaid minimums, where the amendment had been considered for a year and a half, formally proposed on December 7, 1965, advertised first on December 9, 1965, enacted on January 18, 1966, after a Public Hearing on December 28, 1965 and where the property owner applied to the Board of Adjust-

ment for a Variance and Special Exception on December 28, 1965?

(Answered in the affirmative by the lower Court.)

3. Is a zoning ordinance unconstitutional and confiscatory if it denies to the owner and her sons its most profitable use to them as a restaurant contemplated to be operated by the sons while such ordinance permits numerous other business uses?

(Answered in the affirmative by the lower Court.)

4. Does a person whose sole interest in a piece of property is that of a restaurant designer and consultant have a sufficient right or interest in property to apply to the Township or Board of Adjustment for a special exception or variance?

(The lower Court apparently considered this to be a proper application and inferentially answered in the affirmative.)

5. May a variance be granted to use residentially zoned land for vehicular parking when the applicant has no immediate need for such parking facilities?

(Answered in the affirmative by the lower Court.)

6. In considering the impact of a zoning regulation upon the neighborhood in relationship to the property immediately involved, should the court examine the entire neighborhood rather than a single selected form of use?

(The lower Court examined a single selected form of use.)

7. Is a zoning ordinance which is uniform in its application to all land within the zoning district discrimina-

tory or unconstitutional if it causes personal inconvenience and lessened financial gain to one family?

(Presumably answered in the affirmative by the lower Court.)

Wherefore, the Appellant submits that the Court of Common Pleas of Delaware County erred in sustaining the appeal of Ida May Green, owner, and Samuel R. Green, Leslie D. Green and Russell F. Green, tenants; and erred in remanding the case to the Board of Adjustment of Springfield Township for the issuance of a special exception and a variance in accordance with the Opinion and Final Decree of February 23, 1967, and your Appellant respectfully requests that your Honorable Court grant certiorari.

Respectfully submitted,
Read Rocap, Jr.
Read Rocap, Jr.
Solicitor for the Township of Springfield

APPENDIX "E"

SUPREME COURT OF PENNSYLVANIA
Eastern District

Philadelphia 19107
June 1, 1967

Reed Rocap, Jr., Esq.,
Rocap and Rocap,
2nd & Jackson Streets,
Media, Pennsylvania 19063

In Re: Appeal of Ida May Green, Owner, and Samuel R. Green, Leslie D. Green and Russell F. Green, Tenants, from the findings and Order of the Township of Springfield, Delaware County, Pennsylvania—Petitioner: The Township of Springfield. No. 213, Miscellaneous Docket No. 15

Dear Mr. Rocap:

This is to advise that the following Order has been endorsed on the Petition for Special Certiorari Under Rule 68-½, filed in the above captioned case:

"6/1/67. Petition denied.

Per Curiam."

Very truly yours,
George W. Dunn, Jr.
Deputy Prothonotary

GWDJr.:ENT
cc: R. Winfield Baile, Esq.,
Baile, Thompson & Shea,
306 South 69th Street,
Upper Darby, Pennsylvania 19082

APPENDIX "F"

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

No. 213 Misc. Docket No. 15

In Re: Appeal of Ida May Green, Leslie D. Green, and Russell F. Green, from the findings and Order of the Board of Adjustment of the Township of Springfield, Delaware County, Pennsylvania, No. 3961 of 1966 in the Court of Common Pleas of Delaware County, Pennsylvania

---

PETITION FOR RECONSIDERATION OF PETITION FOR CERTIORARI UNDER PENNSYLVANIA SUPREME COURT RULE 68½

To the Honorable, the Justices of the Said Court:

The Petition of the Township of Springfield, by its Solicitor and Attorney, Read Rocap, Jr., Esquire, respectfully prays your Honorable Court to grant a reconsideration of the Petition for Certiorari under Pennsylvania Supreme Court Rule 68½ heretofore filed on March 27, 1967, which Petition was denied on June 1, 1967, by letter notice from the Deputy Prothonotary, George W. Dunn, Jr., stating as follows:

"This is to advise that the following Order has been endorsed on the Petition for Special Certiorari Under Rule 68-½, filed in the above captioned case; 6/1/67. Petition denied.

Per Curiam".

and in support thereof respectfully submits the following:

I.

Preliminary Statement

This is a zoning case involving the constitutionality of an ordinance providing, inter alia, for minimum frontages and areas for a business zoning district in a suburban community. The ordinance in question was a comprehensive revision and modernization of the entire section of the Zoning Code dealing with E Business (as distinguished from Shopping Center Districts, Special Use Districts and Industrial Districts). Beginning in 1957, upon the issuance of a comprehensive report of the Springfield Township Planning Commission, the Township had regularly and systematically endeavored to modernize its Zoning Code based upon recommendations of its Planning Commission and other professional advisors. (See Petition for Certiorari, pages 4, 5, 6 and 7).

The modernization of E Business Districts specifically had been considered for a year and a half prior to December 1965. The first comprehensive draft of the amendatory ordinance in question was prepared in late October or early November 1956, was submitted to the Board of Commissioners for review early in November 1965 and was formally proposed for enactment by said Board on December 7, 1965. The proposed ordinance was

duly advertized and a public hearing was held on December 28, 1965. On the same date, December 28, 1965, the Respondents herein filed their appeal with the Board of Adjustment. On January 18, 1966, the ordinance was enacted by the Board of Commissioners and duly advertized on January 27, 1966. The Respondents' hearing before the Board of Adjustment occurred on January 27, 1966 and the Board of Adjustment denied the application on March 4, 1966. No complaint relative to the legality of the Ordinance was filed with the Court of Quarter Sessions and consequently the ordinance became fully effective as of February 7, 1966, ten (10) days after the advertizement. (See Petition for Certiorari, pages 4, 5, 6 and 7).

Prior to the enactment of the ordinance in question, the Respondent was not enfitled to a use or zoning permit for restaurant purposes since the then existing zoning ordinance prohibited the desired use except through the issuance of a special exception by the Board of Adjustment under conditions and qualifications provided in the Zoning Code and, in addition, through the issuance of a variance for the rear portion of the property zoned residential. (See Petition for Certiorari, page 9). At no time did construction of a restaurant take place nor did the Respondent expend monies in connection with any improvement to the ground. The property is presently vacant and has been vacant for all times material. At no time was there a vested right in the issuance of a permit nor was there any basis for the issuance of mandamus.

The Respondent's real estate expert admitted in the hearing before the Board of Adjustment that the property involved could be used for commercial purposes other than

a restaurant, but such other uses (permissible uses without special exception include office buildings, banks or financial institutions or retail stores) would not produce the most profitable use or the best economic returns. (See Petition for Certiorari, page 8; Board of Adjustment Finding of Fact No. 13).

The Board of Adjustment denied the application on the ground that the area of 88,000 square feet was less than the minimum area of 125,000 square feet required by the zoning ordinance for a special exception, that the proposed use was not permissible use, that the frontage of 200 feet was less than the minimum frontage of 250 feet required by the zoning ordinance for a special exception, and no testimony was presented to the Board to justify the grant of a Variance. (See Petition for Certiorari, pages 7, 8).

The Respondents filed an appeal to the Court of Common Pleas of Delaware County and additional testimony was taken before Sweney, P. J. The Court Below held that the more stringent restrictions under the zoning ordinance were discriminatory and confiscatory (See Finding of Fact No. 36). This holding was made despite the clear evidence that the ordinance applied to all properties in the various E. Business Districts and applied to many uses other than restaurant use. The confiscatory holding was entered in the face of the Respondents' expert testimony showing a mere lessening of economic return if restaurant use were denied and undisputed evidence of many other uses of a commercial nature openly permitted or by Special Exception. (See Exhibit No. T-13; Notes of Testimony before Court Below November 18, 1966, page 15; Zoning Ordinance—Return of Board of Adjustment). In

addition the Court Below held that the ordinance was unreasonable, arbitrary, unnecessary, discriminatory and confiscatory. (See Opinion of Court Below, Finding of Fact No. 32). In the body of the opinion of the Court Below (page 12 thereof) the Court Below found that the deprivation of a single use (restaurant) in itself invalidated the ordinance without taking into consideration that the Respondents were not deprived of the right to use their property for many other permissible business uses under the ordinance.

On March 27, 1967, a Petition for Certiorari under Rule 68½ was filed in your Honorable Court. On June 1, 1967, your Honorable Court entered an Order denying the petition without stating the reason therefor.

II.

ISSUES OF IMPORTANCE RAISED BY PETITION FOR CERTIORARI WHICH REMAIN UNANSWERED

The Court of Common Pleas of Delaware County held unconstitutional an amendment to the Zoning Ordinance of the Township of Springfield which established a minimum frontage and minimum area requirements for clubs, fraternity houses or lodges, places of amusement, hospitals, sanitorium, hotels or restaurants in an E Business District.

It is respectfully submitted that this is a case of first impression upon the right of a municipality to impose a minimum frontage and minimum area requirements in a *Business District* and that the question is of sufficient im-

portance to all municipalities to warrant a considered opinion by your Honorable Court.

It is respectfully submitted that the Court Below erred in finding "22. The requirements that a restaurant should have two hundred fifty (250') feet of frontage and not less than one hundred twenty-five thousand (125,000) square feet in area is an unreasonable, arbitrary, unnecessary, discriminatory and confiscatory requirement and has no relation to the health, safety, morals or general welfare of the Township of Springfield."

It is respectfully submitted that the Court Below erred in failing to consider that the amendment to the Zoning Ordinance was but one step in a series of amendments recommended by the Springfield Township Planning Commission to modernize the Zoning Ordinance; that it had been specifically under consideration for approximately a year and a half before it was formally and publicly proposed on December 7, 1965; that it made many changes other than the increase of the minimum frontage and minimum area requirements; that it was not adopted until after a public hearing thereon had been held on December 28, 1965; and that when adopted on January 13, 1966, it was applicable to all properties within the E Business District and was not an attempt to discriminate against the Respondents or their property.

It is respectfully submitted that the Court Below erred in holding that the Respondents were unconstitutionally deprived of the use of their property, which was vacant land, for a restaurant and in failing to take into consideration the fact that there were many legitimate uses for the property which were permitted under the Zoning Ordinance, as amended, such as an office building, retail store,

bank or other financial institution, medical clinic building and, by special exception, many others.

It is respectfully submitted that the Court Below erred in substantially holding that the Respondents had a vested interest in using their property for a restaurant when they had never secured a permit nor had ever done anything of a substantial character toward actual construction in good faith nor made any substantial expenditures therefor, before the enactment of the amendment to the Zoning Ordinance.

It is respectfully submitted that the Zoning Ordinance, as amended, is not unconstitutional in general because it bears a proper relation to the public health, safety, morals and general welfare of the community.

It is respectfully submitted that the Zoning Ordinance, as amended, is not unconstitutional as to the property of the Respondents because it did not amount to a taking of their property without just compensation.

It is respectfully submitted that the action of the Court Below in holding that the Zoning Ordinance, as amended, was unconstitutional was an abuse of due process under the Fourteenth Amendment of the Constitution of the United States.

It is respectfully submitted that the failure of your Honorable Court to consider and pass upon the aforesaid constitutional question would, in itself, be an abuse of due process under the Fourteenth Amendment of the Constitution of the United States.

It is finally respectfully submitted that if Rule 68-½ of your Honorable Court should be construed as justifying

the refusal to issue certiorari and to consider the constitutional question raised by the petition heretofore filed, then it is respectfully submitted that Rule 68½ of your Honorable Court is an abuse of due process under the Fourteenth Amendment of the Constitution of the United States.

III.
CONCLUSION

Wherefore, your Petitioner respectfully prays that this Honorable Court reconsider and grant the Petition for Certiorari under Pennsylvania Supreme Court Rule 68½.

Respectfully submitted,
/s/ Read Rocap, Jr.,
Read Rocap, Jr.,
Solicitor for the Township of Springfield, Petitioner.

Commonwealth of Pennsylvania
County of Delaware ss:

Read Rocap, Jr., Esquire, being duly sworn according to law, deposes and says that he is the attorney for the Petitioner and that the foregoing petition for reconsideration and statements made therein are all presented in good faith and that the said petition is not filed for the purpose of delay.

/s/ Read Rocap Jr.,
Read Rocap, Jr., Esq.,
Solicitor, Township of Springfield.

Sworn to and subscribed before me this 12th day of June, 1967.

Ruby M. Eisenhart
Notary Public

(Seal)

APPENDIX "G"

SUPREME COURT OF PENNSYLVANIA
Eastern District

Philadelphia 19107
July 6, 1967

Reed Rocap, Jr., Esq.,
Rocap and Rocap,
2nd & Jackson Streets,
Media, Pennsylvania 19063

In Re: Appeal of Ida May Green, Owner, and Samuel R. Green, et al., Tenants, from the findings and Order of the Township of Springfield, Delaware County, Pennsylvania—Petitioner: The Township of Springfield, No. 213, Miscellaneous Docket No. 15

Dear Mr. Rocap:

This is to advise that the following Order has been endorsed on the Petition for Reconsideration of Denial of Petition for Special Certiorari Under Rule 68-½, filed in the above captioned case:

"7/6/67. Petition denied.
Per Curiam."

Very truly yours,
Patrick N. Bolsinger
Prothonotary

PNB:ENT
cc: R. Winfield Baile, Esq.,
Baile, Thompson & Shea,
306 South 69th Street,
Upper Darby, Pennsylvania 19082

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OCT 31 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967
No. 675

TOWNSHIP OF SPRINGFIELD, DELAWARE COUNTY, PENNSYLVANIA,
Appellant

vs.

IDA MAY GREEN, Owner, and SAMUEL R. GREEN, LESLIE D. GREEN and RUSSELL F. GREEN, Tenants,
Appellees

On Appeal from the Supreme Court of Pennsylvania as of No. 213, Miscellaneous Docket No. 15.

MOTION BY APPELLEES TO DISMISS OR AFFIRM

R. WINFIELD BAILE,
Attorney for Appellees.

Of Counsel:
BAILE, THOMPSON & SHEA,
306 South 69th Street,
Upper Darby, Pennsylvania 19082.

Murrelle Printing Company, Law Printers, 201-203 Lockhart Street, Sayre, Pa.
James Patterson, Second & Plum Sts., Media, Pa., Delaware Co. Representative

INDEX

	Page
I. Motion To Dismiss or Affirm	1
II. Opinions Below	2
III. Jurisdiction	3
IV. Statutes Involved	4
V. Counterstatement of Questions Presented	5
VI. Counterstatement of the Case	6
VII. Argument:	
(1) Neither Rule 68 1/2 of the Supreme Court of Pennsylvania nor that Court's denial, regardless of the rule, of Appellant's Petition for Certiorari was an abuse of due process	9
(2) The Appellant is estopped from raising the question of the constitutionality of Rule 68 1/2 because the question was not timely nor properly raised	14
(3) Ordinance No. 786 of Springfield Township, as it relates to the subject property, is repugnant to the Constitution of Pennsylvania and the Constitution of the United States	15
(4) The Township of Springfield, a municipal corporation and a political subdivision of the Commonwealth of Pennsylvania, has no standing in this Appeal	16
VIII. Conclusion	18

TABLE OF CASES

Drumheller v. Berks County Local Board No. 1, 130 F. 2d 610 (1942)	11

Re Twenty-First Senatorial District Nomination, 281 Pa. 273 (1924) 10

State of Ohio ex rel. Bryant v, Akron Metropolitan Park District, 281 U.S. 74, 50 S. Ct. 228, 74 L. Ed. 710 (1930) 12

State of South Carolina v. Nicholas DeB. Katzenbach, Atty. Gen. of the United States, 383 U.S. 301, 86 S. Ct. 803 (1966) 16

Village of Euclid, Ohio v. Amber Realty Co., 47 S. Ct. 114, 272 U.S. 365 (1926) 15

Wade v. Mayo, 68 S. Ct. 1270, 334 U.S. 672, 92 L. Ed. 1647 (1948) 11

Warren County, Mississippi v. Hester, 219 La. 763, 54 S. 2d 12 (1951) 17

Worcester County Trust Co. v. Riley, 302 U.S. 292, 58 S. Ct. 185, 82 L. Ed. 268 (1937) 13

I.

MOTION TO DISMISS OR AFFIRM

The appellees, pursuant to Rule 16 of the revised rules of the Supreme Court of the United States, move that this appeal be dismissed or, in the alternative, that the final judgment of the Supreme Court of Pennsylvania in refusing to grant a writ of certiorari in a zoning case be affirmed, for the following reasons:

(a) This appeal does not present a substantial federal question;

(b) The federal question sought to be reviewed has not been timely or properly raised;

(c) The federal question sought to be reviewed has not been expressly passed on;

(d) The judgment of the Supreme Court of Pennsylvania rests on an adequate nonfederal basis;

(e) The Township of Springfield, a municipal corporation which is a political subdivision of the Commonwealth of Pennsylvania, has no right to take this appeal.

II.

OPINIONS BELOW

The recitation of the opinions below as set forth on pages 2 and 3 of the Jurisdictional Statement is correct.

III.

JURISDICTION

The statutory provisions upon which the appeal herein is based are contained in Title 28, United States Code Annotated, Section 1257(2).

IV.

STATUTES INVOLVED

The Jurisdictional Statement (pages 7 to 14 inclusive) states the constitutional provisions and statutes that are involved in this appeal.

V.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Neither Rule 68 1/2 of the Supreme Court of Pennsylvania nor that Court's denial, regardless of the rule, of appellant's petition for certiorari was an abuse of due process.

2. The appellant cannot now raise the question of the constitutionality of Rule 68 1/2.

3. Ordinance No. 786 of Springfield Township, as it relates to the property involved in these proceedings, is repugnant to the Constitution of Pennsylvania and to the Constitution of the United States.

4. The Township of Springfield, a municipal corporation and a political subdivision of the Commonwealth of Pennsylvania, has no standing in this appeal.

VI.

COUNTERSTATEMENT OF THE CASE

On April 21, 1965, Ida May Green leased the vacant property to her sons for a term of five years. She proposed to build a restaurant building with bar facilities on the ground, and the three sons, as a partnership, intended to conduct a restaurant and bar as a business enterprise.

They made application to the Pennsylvania Liquor Control Board for a liquor license, which was granted.

On May 11, 1965, the Greens applied to the building inspector of the Township of Springfield for a use registration permit and for a zoning permit to allow the use of the subject property and the proposed building to be built thereon as a restaurant and cocktail lounge. This application was refused on May 14, 1965.

The Springfield Township Zoning Ordinance, as of that date, provided that, in an E-business district (where the land was located) a building may be erected and a lot may be used for the purpose of a restaurant when authorized as a special exception by the board of adjustment. As of that date, the zoning ordinance had no provision for frontage or area except the provisions providing for side yard, rear yard and setback, and further providing that not more than 60 per cent of the total area shall be occupied by buildings.

The Greens, therefore, on October 28, 1965, appealed to the board of adjustment from the decision of the build-

ing inspector and made application for a special permit and variance to permit the desired use of the subject property.

The board of adjustment fixed a public hearing to be held on November 22, 1965. The hearing was held as scheduled but, upon advice of the Township solicitor, who is counsel for the appellant here, the case was postponed because the solicitor said that the application for a special exception was defective in form.

At a meeting held on December 7, 1965—following the hearing on November 22, 1965—an amendment to the zoning ordinance of Springfield Township was submitted to the board of commissioners. By resolution, they fixed December 28, 1965 as the time of a public hearing thereon and instructed that notice be given as provided in the zoning ordinance.

The hearing was held as advertised, following which the board of commissioners enacted the said amendment on January 18, 1966. It became effective on February 7, 1966.

That amendment provided that not more than 40 per cent of the total area shall be occupied by buildings; that there shall be two side yards, neither of which shall be less than 25 feet; that there shall be a setback of 30 feet; that there shall be a rear yard of not less than 50 feet and that the lot area shall not be less than 50,000 square feet and a lot frontage of not less than 175 feet. It listed restaurants with clubs, fraternity houses or lodges, places of amusement, hospitals or sanitariums or a hotel, and provided that in each such case the lot area shall not be less than 125,000 square feet and the frontage be not less than 250 feet.

Meanwhile, the Greens, following the hearing on November 22, 1965, filed a petition with the board of adjustment in which they appealed from the decision of the building inspector and applied for a special exception, variance and other relief on constitutional grounds.

The board of adjustment held a hearing on the application on January 27, 1966 and on March 4, 1966 entered an order dismissing the appeal and denying the request for special exception and variance or other relief. On April 1, 1966, the appellees appealed to the Court of Common Pleas of Delaware County.

The Greens' restaurant would have a seating capacity of 190 people, and the building itself would cover 6,350 square feet, or approximately 10 per cent of the business zoned area. It would have two side yards, each 47 feet in width, and a rear yard within the business district of 162 feet, with a buffer planting area 15 feet wide in the rear. The building would set back 80 feet from Baltimore Pike. In short, the proposed building more than meets all of the requirements of the new zoning ordinance except lot area and foot frontage.

The appellees agree with the Statement of the Case set forth on pages 16 and 17 of the Jurisdictional Statement, except that the Court of Common Pleas held that the amendment ordinance was unconstitutional *as it applied to the appellees' property.* (Emphasis supplied). (Page 53, Jurisdictional Statement)

VII.

ARGUMENT

1. Neither Rule 68 1/2 of the Supreme Court of Pennsylvania nor That Court's Denial, Regardless of the Rule, of Appellant's Petition for Certiorari Was an Abuse of Due Process

It is true that the Supreme Court of Pennsylvania possesses all of the jurisdiction and powers of the Court of the King's Bench.

All of the Courts of the common law states, as well as the Supreme Court of the United States, can trace the origin of their customs and procedures to the English common law.

The Act of May 22, 1722, 1 Smith Laws 131, 140 Section XIII, 17 P.S. Section 41, granted the Supreme Court of Pennsylvania the power of appellate review. That Act, passed before the American Revolution, also gave that Court the power to hear "all pleas of the Crown."

One hundred and fourteen years later, the Pennsylvania Act of June 16, 1836, P. L. 784, Section 1, 17 P.S. Section 41, provided that "The Supreme Court of this Commonwealth shall have power to hear and determine" any case removed to that Court from any other Court of the Commonwealth "as fully and amply, to all intents and purposes, as the Court has heretofore had power to

do, under the Constitution and laws of this Commonwealth."

When the Constitution of 1874 was written, it provided in Article V, Section 3 that the Supreme Court would have "appellate jurisdiction by appeal, certiorari or writ of error in all cases, *as is now or may hereafter be provided by law.*" (Emphasis supplied).

In 1889 the legislature did provide by law, by the Act of May 9, 1889, P. L. 158, Section 1, 12 P.S., Section 1131, that:

> ". . . all appellate proceedings in the Supreme Court heretofore taken by writ of error, appeal or certiorari, shall hereafter be taken in a proceeding to be called an appeal."

This Act did not abolish the writ of certiorari, but rather limited the scope, extent and purpose of the review of certiorari:

> *Re Twenty-First Senatorial District Nomination*, 281 Pa. 273 (1924).

There can be no question that the Supreme Court of Pennsylvania still has the power and right to issue a writ of certiorari. This appellant asserts that it has the duty to do so.

Before Rule 68 1/2 of the Supreme Court of Pennsylvania became effective on April 1, 1964, the question never arose because in all cases where the right of appeal was granted by law, a writ of certiorari issued automatically.

At Common Law, the writ of certiorari was a writ issued by a superior Court of record to an inferior Court

of record or other tribunal or officer, exercising a judicial function requiring the certification and return by the latter of some proceeding then pending, or the record and proceedings in some cause already terminated, where the procedure was not in accordance with the rules of common law. The writ was exercised to make the record "more certain" before the higher tribunal:

> *Drumheller vs. Berks County Local Board No. 1,* 130 F. (2d) 610 (1942).

It must be borne in mind, however, that there is no inherent right of appeal in anyone. It must be granted by statutes, or the Supreme Court in the exercise of its judicial discretion may issue writs of certiorari.

The issuance of that writ is a matter of grace and not of right. It rests with the sound discretion of the Court and cannot be claimed as of right:

> *Drumheller vs. Berks County Local Board,* supra.

This Court has said in *Wade vs. Mayo,* 68 Supreme Court 1270, 334 U.S. 672, 92 L. Ed. 1647 (1948),

> ". . . writs of certiorari are matters of grace. Matters relevant to the exercise of our certiorari discretion frequently result in denial of the writ without any consideration of the merits."

Considering the nature of the writ of certiorari and its history in this country, and in particular the Commonwealth of Pennsylvania, the Supreme Court of that State could say the same thing.

Rule 68 1/2 did not abolish either a right of appeal or broad certiorari as appellant contends.

That rule is operative only when no right of appeal exists by statute or the statute is silent. Where the statute provides, appeal still lies. The rule specifically provides that certiorari shall continue to lie, but limits the issuance of the writ only if it is specifically allowed by the Court or a justice thereof.

In this case, the appellant did file a "Petition for Certiorari." That petition contained a Statement of Facts, Appellant's Contention, a Statement of Authority and a Statement of the Questions Involved (pages 59 to 78 inclusive—Jurisdictional Statement).

It was only after consideration of this petition that the Supreme Court of Pennsylvania denied appellant's request for certiorari.

The appellant also filed a "Petition for Reconsideration of Petition for Certiorari." This petition was also denied (pages 79 to 87 inclusive—Jurisdictional Statement).

By Rule 68 1/2, the Supreme Court of Pennsylvania is merely declaring that it will exercise its discretion. This it always had the legal right to do.

The right of appeal or review is not essential to due process, provided due process has already been accorded in the Court of first instance:

> *State of Ohio ex rel. Bryant vs. Akron Metropolitan Park District*, 281 U.S. 74, 50 Supreme Ct. 228, 74 L. Ed. 710 (1930).

No one has denied that due process was not afforded in the Court of Common Pleas of Delaware County, where a hearing was held before President Judge Henry G.

Sweney. Appellant introduced evidence, including photographs and expert witnesses. The Township of Springfield was represented by competent counsel who examined his own witnesses and cross-examined those of the appellees. Feeling the need to take further testimony, an additional hearing was set before the same judge. It was only after the case was presented on briefs and argued before the court en banc that the appellant was denied its cause.

The mere fact that a matter has been decided adversely does not mean that the appellant has been denied due process of law:

> *Worcester County Trust Company vs. Riley*, 302 U.S. 292, 58 Supreme Ct. 185; 82 L. Ed. 268 (1937).

The appellant has confused "the familiar with the necessary" when it alleges that the refusal of the Supreme Court of Pennsylvania to issue the writ of certiorari was a denial of due process.

2. The Appellant Is Estopped From Raising the Question of the Constitutionality of Rule 68 1/2 Because the Question Was Not Timely nor Properly Raised

Rule 68 1/2 provides ". . . in all such cases the Appellant sha" file *within 30 days* from the date of the decision sought to be reviewed a Petition for a special writ of certiorari." (Emphasis supplied).

That rule does not provide any procedure or provision for reconsideration of a petition once the original one was filed within 30 days and acted upon.

The decision of the Court of Common Pleas of Delaware County was made on February 7, 1967 and amended February 23, 1967.

The appellant did not raise the question of abuse of due process until after June 12, 1967—more than 30 days after the decision of the lower court.

This was not the proper time to raise that question.

The necessity for demanding that a constitutional issue be timely raised is obvious. Without it, a petitioner would be able to avail himself of any process and, upon being unsuccessful, contend that the process is unconstitutional. This would unnecessarily delay all proceedings, which is precisely what has happened in this case.

It has been almost two and one-half years since appellees' application for a permit to construct their restaurant was filed.

3. Ordinance No. 786 of Springfield Township, as It Relates to the Subject Property, Is Repugnant to the Constitution of Pennsylvania and the Constitution of the United States

---

This question has been passed upon by the Court of Common Pleas of Delaware County, Pennsylvania, and by the Supreme Court of the State of Pennsylvania.

It is not necessary to argue the merits of this case here.

It is sufficient to say that evidence of sufficient strength was presented to the learned hearing judge to persuade him that the restrictions imposed upon the subject property by the ordinance were unreasonable, harsh, discriminatory and confiscatory. They had no substantial relation to the public health, safety, morals or general welfare of the Township of Springfield or to the area immediately surrounding the subject property:

> *Village of Euclid, Ohio vs. Amber Realty Company,* 47 Supreme Ct. 114, 272 U.S. 365 (1926).

The answers filed by the Greens to the petition for a writ of certiorari and the petition for reconsideration ably demonstrate this.

4. The Township of Springfield, a Municipal Corporation and a Political Subdivision of the Commonwealth of Pennsylvania, Has No Standing in This Appeal

Both the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States refer to "persons."

This Court has said in *State of South Carolina, Plaintiff vs. Nicholas DeB. Katzenbach, Attorney General of the United States*, 383 U.S. 301, 86 Supreme Ct. 803 (1966):

> "... the word 'person' in the context of the due process clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the states of the Union, and to our knowledge this has never been done by any court."

What applies to the Fifth Amendment can be applied with equal force to the clause of the Fourteenth Amendment, which states:

> "... nor shall any *state* deprive any *person* of life, liberty or property, without due process of law." (Emphasis supplied).

The word "person" as used in that Amendment does not include a state of the Union and, of course, would not include a political subdivision of that state.

The Township of Springfield, by the decision of the Common Pleas Court of Delaware County, by the decision of the Supreme Court of Pennsylvania in refusing a writ of certiorari under Rule 68 1/2 has not and cannot be deprived of any property without due process of law.

The Supreme Court of Louisiana held:

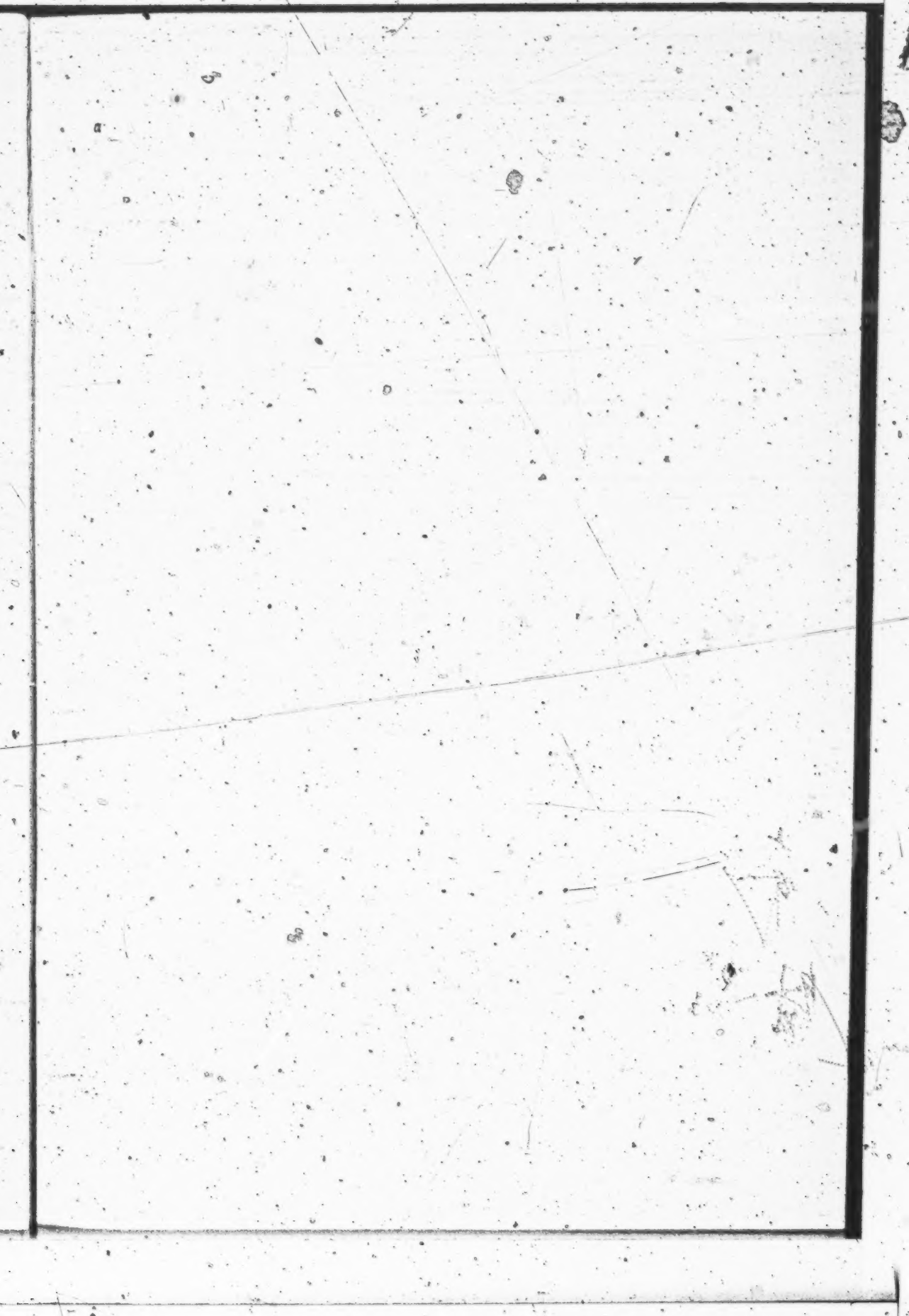
"... it is plain that the Fourteenth Amendment of the Federal Constitution, declaring that no state shall deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws, is utterly without application to the political subdivision of a state which cannot be viewed as a person within the purview of the constitutional provision ..."

Warren County, Mississippi vs. Hester, 219 La. 763, 54 So. 2nd 12 (1951).

VIII.
CONCLUSION

Showing the foregoing, it is respectfully submitted that the appellant has presented no substantial questions for the decision of this Court and that, therefore, this appeal should be dismissed or, in the alternative, the judgment of the Supreme Court of Pennsylvania should be affirmed.

Respectfully submitted:
R. WINFIELD BAILE,
Attorney for Appellees.



INDEX

	PAGE
Petition for Rehearing	1
Conclusion	10

TABLE OF CITATIONS

CASES:	
Board of Education v. Blodgett (1895), 155 Ill. 441, 40 N.E. 1025, 31 L.R.A. 70, 45 Am. St. Rep. 348	4
Covington and L. Turnpike Road Co. et al. v. Sandford et al., 164 U.S. 578, 17 S. Ct. 198, 41 L. Ed. 560 (1896)	2
Gretna v. Bailey (1917), 141 La. 625, 75 So. 491, Ann. Cas. 1918E, 566	5
Grosjean v. American Press Co., 297 U.S. 233, 56 S. Ct. 444, L. Ed. (1936)	3
Lawrence v. Louisville (1895), 96 Ky. 595, 29 S.W. 450, 27 L.R.A. 560, 49 Am. St. Rep. 309	5
State of South Carolina v. Katzenbach, 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2d 789	1, 2
Warren County, Mississippi v. Hester, 219 La. 743, 54 S. 2d 12	2
ACT:	
Act of August 14, 1963, P. L. 819 (17 P.S. 181 et seq.)	7

CONSTITUTION:

U. S. Constitution:

Fifth Amendment 1, 2

Fourteenth Amendment 1, 2, 4

TEXT:

McQuillan on Municipal Corporations, 3rd Ed., Vol. 1, p. 460 3

PETITION FOR REHEARING

The appellant, the Township of Springfield, Delaware County, Pennsylvania, respectfully requests that your Honorable Court grant rehearing of its order dated December 11, 1967 which dismissed its appeal for want of jurisdiction and, treating the papers whereon the appeal was taken as a petition for a writ of certiorari, also denied certiorari. The appellant further respectfully requests your Honorable Court to now note probable jurisdiction, or, in lieu thereof, to grant certiorari.

The Jurisdictional Statement previously filed presented the question that Rule 68 1/2 of the Supreme Court of Pennsylvania is an abuse of due process under the Fourteenth Amendment of the Constitution of the United States in that it attempted to abolish the right to appeal in the nature of a broad certiorari which had heretofore existed as a part of the common law of Pennsylvania.

In the Jurisdictional Statement no authority was cited to justify the right of the Township of Springfield to raise such a question. The appellant assumed that its property rights were protected by the Constitution of the United States to the same extent as are the rights of any other property owner.

The motion by appellees to dismiss or affirm raised the issue that the word "person" in the context of the due process clause of the Fifth Amendment cannot be expanded to encompass the states of the union, citing *State of South*

Carolina v. Katzenbach, 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2nd 769. It then argues that the same reasoning is applicable to the language of the Fourteenth Amendment and that it also applies to political subdivisions of a state and cites only one case in support of this contention, namely *Warren County, Mississippi v. Hester*, 219 La. 743, 54 So. 2nd 12.

It is respectfully submitted that such argument is fallacious. A reading of the Fifth Amendment beside the Fourteenth Amendment will clearly show that they are not interdependent. Every word in the Fifth Amendment shows that it was intended to protect individuals. The words "held to answer for a capital or otherwise infamous crime" "twice put in jeopardy of life and limb", and "witness against himself" by no stretch of the imagination could be applied to a corporation, private or municipal.

However, there is no such language in the Fourteenth Amendment. Section 1 was directed at arbitrary actions of States and while it is apparent that the State itself cannot be protected against its own action, it is equally clear that associations other than individuals may need the protection of this amendment.

It has been held in a long line of cases in your Honorable Court including *Covington and L. Turnpike Road Co. et al. v. Sandford et al.*, 164 U.S. 578, 17 S. Ct. 198, 41 L. Ed. 560 (1896), that corporations are "persons" within the language of the Fourteenth Amendment. In that case, Mr. Justice Harlan said at page 592:

> "It is now settled that corporations are persons within the meaning of the Constitutional provisions

forbidding the deprivation of property without due process of law, as well as the denial of the equal protection of the laws. Santa Clara Co. v. Southern Pac. Ry. Co., 118 U.S. 394, 6 Sup. Ct. 1132; Pembrook Con. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 189, 8 Sup. Ct. 737; Railroad Co. v. Beckwith, 129 U.S. 29, 9 Sup. Ct. 207; Railroad Co. v. Gibbes, 142 U.S. 386, 391, 12 Sup. Ct. 255."

Again in *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S. Ct. 444, L. Ed. (1936), your Honorable Court said at page 244:

"Appellant contends that the Fourteenth Amendment does not apply to corporations; but this is only partly true. A corporation, we have held is not a 'citizen' within the meaning of the privileges and immunities clause. Paul v. Virginia, 8 Wall 168, 19 L. Ed. 357. But a corporation is a 'person' within the meaning of the equal protection and due process of law clauses, which are the clauses involved here. Covington & L. Turnpike Co. v. Sandford (supra); Smyth v. Ames, 169 U.S. 466, 522, 18 S. Ct. 418, 42 L. Ed. 819."

No case involving the application of this principle to municipal corporations appears to have reached your Honorable Court but it is respectfully submitted that the same reasoning is applicable at least with respect to their proprietary interests. The dual nature of municipal corporations was pointed out in *McQuillan on Municipal Corporations,* 3rd Edition, Volume 1, page 460, as follows:

"The purposes of municipal corporations, using the term in its strict meaning, are two-fold, the one to

assist in the government of the state as an agent of the state, often referred to as an arm of the state, and to promote the public welfare generally; the other to regulate and to administer the local and internal affairs of the territory which is incorporated, for the special benefit and advantage of the urban community embraced within the corporate boundaries. These two functions are usually referred to as the dual powers of municipal corporations, as noted in the preceding chapter of this work. When acting in their private or proprietary character, they are a separate entity acting for their own purposes, and not a subdivision of the state, and they represent those proprietary interests that appertain to them in common with other corporations. Private powers of a municipal corporation are synonymous with the terms home rule and local self-government."

This distinction has been recognized in many cases. Thus in *Board of Education v. Blodgett* (1895), 155 Ill. 441, 40 N.E. 1025, 31 L.R.A. 70, 45 Am. St. Rep. 348, holding that a school district's defense to a money demand, arising from a complete running of the statute of limitations, was within the protection of the Fourteenth Amendment to the Federal Constitution, the Court stated:

"The *political rights and privileges* delegated to counties, school districts and cities are not within the constitutional provisions against laws which impair vested rights but their *property rights* are protected by the same constitutional guaranties which shield the property of individuals from legislative aggression."

See *Lawrence v. Louisville* (1895), 96 Ky. 595, 29 S.W. 450, 27 L.R.A. 560, 49 Am. St. Rep. 309, which also in-

volved the defense of the statute of limitations raised by the City of Louisville. There the Court said:

> "The law making branch of the government has no more power to destroy a defense that has accrued than it has to take a citizen's property 'without due process of law'. When one is released from a demand by the statute of limitations, his right of defense is as valuable as the right (of the plaintiff) to institute the action. When the defense has accrued, right to maintain the action is destroyed."

In *Gretna v. Bailey* (1917), 141 La. 625, 75 So. 491, Ann. Cas. 1918E, 566, holding unconstitutional as a whole a statute providing for a commission form of government for a certain city, on the ground that the act undertook to establish a city court not authorized by the State Constitution, it was held:

> "A municipal corporation, being the creature of the legislature, cannot question the authority of its creator to amend or abrogate its charter, *except insofar as the legislature attempts to exceed its own constitutional authority.* But the General Assembly is as well bound not to violate the mandates expressed in the Constitution as a corporation created by the legislature is controlled by its statutes. *Hence a municipal corporation, having authority to prosecute and defend suits in the courts, may invoke the protection afforded by the Constitution to prevent a violation of its rights.*"

It is respectfully submitted that the reasoning in the foregoing cases is sound and that it is applicable to the present case. It was not the political rights of the Town-

ship of Springfield that were affected by Rule 68 1/2 of the Supreme Court of Pennsylvania; it was the property rights of the Township. Prior to April 1, 1964, it had an unqualified right to appeal the decision of the Court of Common Pleas to the Supreme Court of Pennsylvania. That right, in common with all other persons in the Commonwealth had become a part of the common law of Pennsylvania. Rule 68 1/2 of the Supreme Court (which had the effect of a statute) was not an action of the Commonwealth specifically designed to regulate one of its political subdivisions, but was applicable to all classes of persons which would be affected thereby. In this particular case, had the decision in the lower court been against the appellee and they had presented a petition to the Supreme Court under Rule 68 1/2, which was refused, they would certainly be a "person" entitled to raise the constitutional question. It is respectfully submitted that the Township of Springfield is likewise entitled to do so, since the procedural question has nothing to do with its political status.

It is respectfully submitted that Rule 68 1/2 of the Supreme Court of Pennsylvania is invalid for an additional reason which was not discussed on the Jurisdictional Statement previously filed. In Pennsylvania there are two courts of appellate jurisdiction, the Superior Court and the Supreme Court. Without going into details concerning subject matters not here involved, it is sufficient to state that in general the principal difference between the jurisdiction of the two courts was determined by the amount in controversy. Thus, an appeal, including an appeal in a zoning matter, which did not exceed ten thousand dollars ($10,000.00) would be taken to the Superior Court, while one which involved over ten thousand dollars ($10,000.00) would be taken to the Supreme Court.

However by the Act of August 14, 1963, P. L. 819 (17 P.S. 181 et seq.), effective December 1, 1963, the respective jurisdiction of the Supreme and Superior Courts was changed and, in general, was determined by the subject matter of the controversy rather than the amount in controversy.

Section 7 4 of the new act (17 P.S. 191.4), provided as follows:

"In the following classes of cases, the Superior Court shall have no jurisdiction thereof, but the *appeal* from the judgment, order or decree of the lower court *shall be taken directly to the Supreme Court:*

(1) . . .;
(2) . . .;
(3) . . .;
(4) . . .;
(5) . . .;
(6) . . .;

(7) *Appeals* from orders of the courts of common pleas and courts of quarter session of the peace *involving or arising out of acts, ordinances, regulations or orders relating to zoning;*

(8) . . .;
(9) . . .;
(10) . . .;
(11) . . .;"

Thus as of December, 1963, the Act of 1963 specially spells out that *appeals* in zoning matters *shall be taken* directly to the Supreme Court. On February 5, 1964, ef-

fective April 1, 1964, the Supreme Court completely ignored the provisions of the Act of 1963 and substituted a petition for allowance of certiorari in lieu thereof. Thus, within a space of four months, the right to appeal to some court in zoning matters has been completely removed. The Act of 1963 deprived the Superior Court of jurisdiction but it can be said that it substituted another forum in its place. Rule 68 1/2 eliminated the right of appeal to the Supreme Court and substituted nothing except the largess of a Justice of the Court. It is respectfully submitted that this was not the intention of the Legislature and that the question is of vital importance, not only in this case, but to all situations where the rule is applicable.

The jurisdictional statement filed by appellant referred, on page 23, to the substantial and important issue involved in respect to the general, as opposed to the specific, unconstitutionality of the zoning ordinance amendment. The crucial aspect of this issue may have been overlooked since your appellant did not present the problem in detail. Appellant submits that the opinion of the Court of Common Pleas declares the zoning ordinance generally unconstitutional in respect to minimum frontage and area requirements for a restaurant in a business zoning district and such declaration is not limited to the specific property of the appellees.

Finding of Fact No. 32 (page 49, Jurisdictional Statement) found in the opinion of the Court of Common Pleas is a broad and sweeping assertion of unconstitutionality applicable to all restaurants, to wit:

> "32. The requirement that a restaurant should have two hundred fifty (250') feet of frontage and not less than one hundred twenty-five thousand (125,000)

square feet in area is an unreasonable, arbitrary, unnecessary, discriminatory and confiscatory requirement and has no relation whatsoever to the health, safety, morals or general welfare of the Township of Springfield."

The appellant, by reason of the adoption and application of Rule 68 1/2 by the Supreme Court of Pennsylvania, which has the force and impact of a statute enacted by the state legislature, has been unconstitutionally denied the right of appellate review to determine not only the soundness of the trial court's decision and the facts upon which it is based, but the scope of the same. So long as these questions remain unresolved it can be reasonably anticipated that the appellant will be obliged to face litigation and challenge in regard to every zoning use application for not only restaurants but for hotels, hospitals, clubs, sanatoria, places of amusement, fraternity houses and lodges in any business district wheresoever situate. To the extent that the alleged unconstitutionality is interpreted as being broad in scope the matter is of the utmost importance to the appellant municipality and its citizenry which approaches 30,000 in number and effects property rights and interests having uncalculable but substantial value.

The imposition of Rule 68.1/2 permits and encourages zoning litigation to be terminated at the level of the inital court of record in Pennsylvania and since there are fifty-nine (59) judicial districts of equal standing judicially, such serious matters as constitutionality in zoning will continue to be decided in separate forums without the controlling influence of review by the Supreme Court of Pennsylvania. In comparison to this existing situation, it is noteworthy that your Honorable Court under Rule 19(b)

has indicated that conflicting decisions of courts of appeals will be considered as a basis for granting review on a writ of certiorari.

CONCLUSION

For the reasons set forth in this petition for rehearing, as well as the reasons set forth in the Jurisdictional Statement previously filed, it is respectfully submitted that a rehearing or certiorari should now be granted.

Respectfully submitted,
READ ROCAP, JR.
Attorney for Appellant

Certificate of Counsel

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.

READ ROCAP, JR.
Attorney for Appellant

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

TOWNSHIP OF SPRINGFIELD, DELAWARE COUNTY, PENNSYLVANIA *v.* GREEN ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

No. 675. Decided December 11, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.